REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench.

With Tables of the Names of the Cases and Principal Matters.

By EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum. Hor.

VOL XIII.

Containing the Cases of MICHAELMAS, HILARY, and EASTER Terms, in the 51st Year of GEO. III. 1810—1811.

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1811.

JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of these REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SIMON LE BLANC, Knt.
Sir JOHN BAYLEY, Knt.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Knt.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Knt.

ERRATA.

Page 332. in the laſt line of *Forbes* v. *Aſpinall*, ſtrike out *caſe*, or inſert the words *in this* before it.

In Vol. XII.

- 251 l. 2. for *will* read *caſe*.
254. l. 10. for *having* read *leaving*.

A

TABLE

OF THE

CASES REPORTED

IN THIS THIRTEENTH VOLUME.

N. B. Those Cases which are printed in *Italics* were cited from MS. Notes.

Cock

Rex



CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Fifty-first Year of the Reign of GEORGE III.

1810.

TOMBS *against* PAINTER.

Wednesday, Nov. 7th (*a*).

In debt on bond conditioned not to *assault, molest, or injure the person* of the plaintiff, the replication, alleging that the defendant assaulted, molested, and injured the person of the plaintiff *by* then and there beating, &c. *and otherwise ill-treating him*, is sustained by evidence that the defendant, who was sitting in the same room, jumped up from his seat with his fist clenched as if to strike the plaintiff, but was pulled back to his seat by another before he was within reach of the plaintiff.

And this was a sufficient assignment, by the replication, of a breach of the condition, for which the jury were to assess damages on the stat. 8 & 9 *W.* 3. *c.* 11. *s.* 8. although such breach were not alleged in formal terms to be laid *according to the statute*.

DEBT on bond, in the penalty of 100*l.*, conditioned not to assault, molest, or injure the person of the plaintiff wilfully or designedly in anywise howsoever. Plea, that the defendant had not done so. Replication, that the defendant on such a day, at, &c., assaulted, molested, and injured the person of the plaintiff wilfully

(*a*) I was prevented by indisposition from attending the Court in this term till *Tuesday* the 13th of *November*, beginning with the case of *Hanson* v. *Boothman*; and I am indebted for the notes taken in court before that day to some of my friends at the bar.

and

1810. — TOMBS *against* PAINTER.

and designedly, *by* then and there with force and arms wilfully and designedly beating, bruising, wounding, and otherwise *ill-treating* him. Rejoinder, that the defendant did not assault, molest, or injure the person of the plaintiff, wilfully and designedly, modo et formâ; and concluding to the country. At the trial before *Bayley* J. at *Salisbury*, the evidence was that these parties being in the same public house in different parts of the room, the defendant jumped up from his seat, with his fist clenched, as if to strike the plaintiff, but was pulled back to his seat by another person, and did not get within reach of the plaintiff; but he abused him and swore at him, and drank the beer out of his cup. This, it was contended, did not support the issue for the plaintiff, which was that the defendant assaulted, molested, and injured the plaintiff's person *by* beating, &c. "and otherwise *ill-treating*" *him*. But the learned Judge thought that the evidence satisfied the latter words, and the plaintiff took a verdict with 1*s*. damages for the detention of the debt, and 1*s*. damages upon the breach assigned. And now,

Lens Serjt. moved, by leave, to set aside the verdict and enter a nonsuit; and, first, renewed the objection, that the evidence did not sustain the issue, which was confined to an ill-treatment of the plaintiff's *person*.

Lord ELLENBOROUGH C. J. The clenching his fist at the plaintiff was an assault, and an act of personal offence.

Then another question was made, whether *the penalty* were to be recovered? *Bayley* J. observed, that damages

were

were affeffed at the trial under the ftatute of *William* (*a*). *Lens* Serjt. objected that no breach was affigned as required by the ftatute. But *the Court* all agreed that a breach was fufficiently affigned in the replication, though it were not faid in terms to be *according to the form of the ftatute*. And they refufed the rule (*b*).

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TOMBS *against* PAINTER.

(*a*) 8 & 9 *W.* 3. *c.* 11. *f.* 8., which is compulfory upon the plaintiff to affign breaches in cafes coming within it. Vide *Roles* v. *Rofewell*, 5 *Term Rep.* 538. *Hardy* v. *Bern*, *ib.* 636. and *Welch* v. *Ireland*, 6 *Eaft*, 613.

(*b*) In *Hardy* v. *Bern*, in the Exch. *E.* 30 *Geo.* 3. 5 *Term Rep.* 540. and 636. the fame objection was made in argument, that the plaintiff had not elected to proceed under the ftatute, in not having alleged his breaches "according to the form of the ftatute," but Lord *Kenyon* C. J. and *Buller* J. before whom the writ of error was argued, and who reported their opinion to my Lord Chancellor thereupon, thought that the breaches were fufficiently affigned within the ftatute; but for default of damages being affeffed upon fuch breaches by the jury at the trial of the iffues, a venire de novo was awarded. The practice of affigning breaches *according to the form of the ftatute* probably firft arofe in cafes where more than one breach was affigned; becaufe before the ftat. 8 & 9 *W.* 3. *c.* 11. fuch pleading would have been double. Vide *Com. Dig.* tit. Pleader, 2 *V.* 2. Per C. B. *E.* 7 *Geo.* 1. and acc. per Cur. ibid. *M.* 10 *Geo.* 1. in *Walker* v. *Prieftley*, S. C. *Com. Rep.* 376. and *Dy.* 297. *b.* (mifprinted 295. *b.*)

1810.

Wednesday, Nov. 7th.

Under the stat. 5 *W.* & *M.* c. 11. *s.* 2 & 3. requiring a defendant removing an indictment from the sessions by certiorari, to find two sufficient manucaptors, who shall enter into a recognizance in 20*l.* conditioned to appear, plead, and try, &c. and that if the defendant be convicted, &c. the Court shall give *reasonable* costs to be taxed, &c.; *and that the said recognizance shall not be discharged till the costs so taxed shall be paid*; the amount of the costs to be taxed is not limited by such recognizance, which is only a further security for them; and the Court will not discharge the recognizance till the taxed costs are paid to the prosecutor.

The KING *against* TEAL and Others (*a*).

HULLOCK moved for a rule nisi to discharge a side-bar rule for taxing the prosecutor his costs of this indictment, and also to discharge a recognizance entered into by two manucaptors for the defendant *Teal*, as required by the stat. 5 *W.* & *M.* *c.* 11. on removing this indictment from the quarter sessions by certiorari into this court, on payment of 40*l.* (*b*), the amount of such recognizance. By sect. 2. of that act, no certiorari at the instance of a defendant shall be granted, for removing any indictment from the quarter sessions, unless he shall find two sufficient manucaptors, who shall enter into a recognizance in 20*l.* conditioned for the defendant to appear and plead in *B. R.*, "and at his and their own costs and charges to cause and procure the issue joined, &c. to be tried at the next assizes," &c.: which recognizance, &c. "shall be certified into *B. R.* with the certiorari and indictment, to be there filed." And by sect. 3. If the defendant prosecuting such writ of certiorari be convicted, "then the court of *B. R.* shall give *reasonable costs* to the prosecutor," &c.; "which costs shall be taxed, according to the course of the said court: and the prosecutor, for the recovery of such costs, shall within ten (*c*) days after demand made of the defendant, and refusal of payment, on oath, have an attachment," &c.

(*a*) Vide 11 *East*, 307. S. C. on a motion for a new trial after a conviction of these defendants upon an indictment for a conspiracy.

(*b*) The practice is to take the recognizance in 20*l.* from each of the manucaptors.

(*c*) In *M.* 30 *Geo.* 3. it was held that these should be ten entire days.

"*And*

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The KING *against* TEAL and Others.

"*And the said recognizance shall not be discharged till the costs so taxed shall be paid.*" The question was, whether this provision of the act would be satisfied by payment of the sum for which the recognizance was taken. He said that there was no decision upon this statute: but upon a recognizance in 20*l.* entered into by the prosecutor of an information in this court to prosecute with effect, as required by the stat. 4 & 5 *W.* & *M.* *c.* 18. *s.* 2. it has been held (*a*) that the defendant, after acquittal, is not entitled to costs beyond the extent of the recognizance. That act directs that the clerk of the crown shall not, without the express order of the Court, file any information for any of the causes mentioned "before he shall have taken, or shall have delivered to him a recognizance from the person procuring such information to be exhibited, &c. to the person against whom such information is to be exhibited, in the penalty of 20*l.*, that he will effectually prosecute such information, and abide by and observe such orders as the Court shall direct," &c. And in case the defendant shall appear and plead to issue, and the prosecutor shall not at his own proper costs and charges, within a year after issue joined, procure the same to be tried, or a verdict shall pass upon such trial for the defendant, &c., "then the said Court of K. B. is hereby authorized to award to the defendant *his costs*," &c. unless the Judge shall certify, &c.: "and in case the said informer shall not within 3 months next after the said costs taxed, and demand made thereof, pay to the defendant the said costs, *then the defendant shall have the benefit of the said recognizance to compel him thereto.*"

(*a*) *Rex* v. *Howell*, *Ca. temp. Hardw.* 247. *Rex* v. *Morgan*, 2 *Stra.* 1042. and *Rex* v. *Filewood*, 2 *Term Rep.* 145.

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The KING *against* TEAL and Others.

The different wording of the two acts was noticed by *Le Blanc* J.

Lord ELLENBOROUGH C. J. By the act in question the recognizance was meant to operate as a *further* security for the costs. The Court are thereby directed to give reasonable costs to the prosecutor, to be taxed according to the course of the court: and then the words are that "the said recognizance (which was before directed to be taken) shall not be discharged till the costs so taxed shall be paid." The costs have not been paid. How then can we direct the recognizance to be discharged?

Per Curiam, Rule refused.

Thursday, Nov. 8th.

FINLEY *against* JOWLE.

The Court refused, on motion, to discharge an infant plaintiff, who had sued without prochein amy or guardian, and was in execution for the costs.

BARROW moved to discharge out of custody the plaintiff, who was an infant in execution for the costs of the suit, in which he had failed, upon the ground that an infant plaintiff was not liable for costs. Here there was no prochein amy or guardian, who would have been liable for the costs (*a*).

But *the Court* said that the plaintiff had concealed his infancy, and therefore they would not relieve him.

Rule refused (*b*).

(*a*) Vide *Hullock* on Costs, ch. 3. s. 4. "Of costs in actions by or against Infants."

(*b*) In *Gardiner* v. *Holt*, 2 *Stra.* 1217. the Court refused to discharge an infant plaintiff in execution for costs, on motion; saying it was matter of error, if costs could not be given. And yet the plaintiff there had sued by prochein amy, whom the Court will oblige to pay costs.

costs. Vide *Slaughter* v. *Talbot*, *Willes*, 190. And in *Hamlen* v. *Hamlen*, 1 *Bulstr.* 189. where an infant sued by attorney, and was nonsuited, the Court also refused to relieve him from the costs. And vide *Thrustout*, *on the Demise of Dunham*, *an Infant*, v. *Percivall*, *Barnes*, 183. where two cases are cited of attachments against infants for non-payment of costs in *C. B.*

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FINLEY *against* JOWLE.

VENNING *against* LECKIE.

Friday, Nov. 9th.

The defendant agreed in writing to take one half share of certain goods bought by the plaintiff on their joint account; half in the profit or loss, and to furnish the plaintiff with half the amount in time for the payment thereof; the goods being to be paid for by bills: held, 1st, that this was an agreement *relating to the sale of goods*, within the exemption in the stamp act 44 *G.* 3. *c.* 98. sched. A, and did not require a stamp. 2dly, That the plaintiff having paid the whole price of the goods which were to constitute the partnership stock, to which both parties were contribute equally, an action lay against the defendant for his moiety of the price which was to be furnished by him in the first instance; although there might be an account to be taken between them as partners upon the subsequent disposal of the joint stock.

THE plaintiff declared for a breach of the following contract in writing. — " *London*, 1st of *Dec.* 1808 — " Messrs. *W. Venning* and Co. I agree to take one half " share of the flax undermentioned, bought by you on " our joint account — say half in the profits or loss, and " *to furnish you with half the amount in time for the payment* " *thereof*, in case you require it." (Signed by the defendant). Under which contract was written,

" *Dec.* 1st, 1-15 of *H.* and Co. 20 tons — 6 months;
" 2d, 2-16 of *A. B.* &c., 10 tons — 6 months;"

together with other like memoranda, being a regular list of the persons of whom the flax was bought, the quantity, and time of payment. At the trial before Ld. *Ellenborough* C. J. at *Guildhall*, it appeared that the defendant had refused to pay for his share of the flax according to the contract; and the plaintiff recovered a verdict for the amount in value.

Park now moved (by leave reserved at the trial) to set aside the verdict and enter a nonsuit, upon two objections; 1st, that the written contract ought to have been stamped. The answer given to which was, that it was a contract " *relating to* the sale of goods," and therefore within the

1810.

VINNING *against* LICKIE.

exemption of the ſtamp acts (*a*): but this exemption, he contended, only related to contracts between vendor and vendee; and the caſe of the guarantee (*b*) falls within the latter deſcription; for the goods are ſold upon his credit.

Lord ELLENBOROUGH C. J. This contract relates to the payment of the price of goods purchaſed by the plaintiff for himſelf and the defendant, and is therefore a contract within the words of the exemption "*relating to the ſale of goods*. [*Park* obſerved, that ſome of the goods were purchaſed after the 1ſt of *December*, when the agreement was dated.] If it do not relate to the ſale of goods, what does it relate to? Is it more or leſs than an agreement by the defendant to buy half the goods?

Secondly, it was objected, that this was the caſe of a partnerſhip, and that no action lay by one partner againſt another; but the plaintiff ſhould have proceeded by bill in equity; for the defendant had had no account of the produce, and would be compelled to ſeek his relief there.

Lord ELLENBOROUGH C. J. There are many deeds of copartnerſhip in which the partners covenant, each to advance a certain ſum at firſt: and can it be ſaid that no action would lie by one to enforce that covenant againſt another, becauſe there are accounts between them afterwards, which require unravelling in a court of equity. [*Park* agreed that ſuch an action would lie upon an independent covenant.] The purchaſe of the goods was to launch the partnerſhip; for which, between themſelves, each was to contribute his ſhare.

(*a*) 23 *Geo.* 3. *c.* 58. *ſ.* 4. 35 *Geo.* 3. *c.* 30. 37 *Geo.* 3. *c.* 90. and 44 *Geo.* 3. *c.* 98. ſched. A.
(*b*) *Warrington* v. *Furbor*, 8 *Eaſt*, 242.

LE BLANC

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VENNING *against* LECKIE.

LE BLANC J. The refpective fums were to be paid by each, before there could be any account of profit or lofs between them, as partners, upon the goods.

Per Curiam, Rule refufed (*a*).

(*a*) Vide *Saville* v. *Robertfon and Another*, 4 *Term Rep.* 720., explained in *Gouthwaite* v. *Duckworth*, 12 *Eaft*, 426.

DOE, on the Demife of TOLLET, *againft* SALTER.

Friday, Nov 9th.

In ejectment, the premifes being laid to be in *Farnham*, and proved to be in *Farnham Royal*, is not a fatal variance, unlefs it be fhewn that there are two *Farnhams*.

THE premifes were laid to be in the parifh of *Farnham*, and at the trial before *Heath* J. at *Buckingham* were proved to be in the parifh of *Farnham Royal*; which was contended to be a fatal variance: but the learned Judge faid, that unlefs the defendant could prove that there were two *Farnhams*, he fhould direct a verdict for the plaintiff; and no fuch proof being offered, the plaintiff recovered accordingly.

Sellon Serjt. now moved to enter a nonfuit, on account of the variance, and mentioned a cafe in *C. B.* in 1808, where in trefpafs for breaking and entering a dwelling-houfe, it was laid to be in the parifh of *Chelfea*, and proved to be in *St. Luke*, *Chelfea*; which was held to be fatal. But

The Court held the direction of the learned Judge in this cafe, there being no other *Farnham*, to be right, and refufed the rule.

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Friday, Nov. 9th.

CHAPMAN *against* COWLAN.

Parchment writings preserved amongst the muniments of a manor, dated in 1698 & 1717, purporting to be signed by many persons, copyholders of the manor, stating an unlimited right of common in the commoners, which having been found inconvenient, they had agreed to stock the common in a certain restricted manner, is evidence of reputation as to the general right, sufficient to destroy the restricted right set up by the plaintiff, a copyholder, in an action on the case against a freeholder of the manor for overstocking the common beyond such stint: although it was objected that the instrument was not proved to have been signed by a majority of the then copyholders of the manor, nor that the plaintiff held the copyhold tenement of any one of those who had signed it.

THIS was an action upon the case by a copyholder against a freeholder of the manor of *Crowle* in *Lincolnshire*, for the disturbance of the plaintiff's right of common, by the defendant surcharging the common. The first count stated, that the plaintiff was possessed of a messuage and 30 acres of land in the manor of *Crowle*, in respect of which he claimed common for all commonable cattle levant and couchant, &c. in and throughout all the commonable grounds in the manor. The second count was founded on a like claim in respect of 30 acres of land. The third, in respect of a messuage and 30 acres of land, claimed common in, upon, and throughout all the commonable grounds of the manor, in manner following; in part thereof, called the stinted cow pasture, in every year, for certain cattle, to wit, 6 cows, 6 mares or geldings, if above 3 years old, and the sucking foals of such mares, levant and couchant upon the said messuage and lands upon and from *May-day*, old stile, until and to *Michaelmas-day* O. S.; and for all cattle levant and couchant &c. upon and from *Michaelmas-day* O. S. until the feast of the *Annunciation*: and on the residue of the said commonable grounds, for all commonable cattle, levant and couchant &c. upon and from *May-day* O. S. until and to the feast of the *Annunciation* O. S. There were many other counts stating the claim of common in different ways.

At the trial before *Grose* J. at *Lincoln*, the steward of the manor having been called as a witness, by the defendant, produced a parchment writing from amongst the muni-

muniments of the manor, dated in 1698, and purporting to be signed by many persons, copyholders, stating an unlimited right of common, which having been found inconvenient, they had agreed to stock the common in the manner which the plaintiff's witnesses had proved, and which corresponded with one of the counts in the declaration: and another parchment writing to the same effect, dated in 1717 (a). Whereupon it was contended on the part of the defendant, that the supposed right set up by the plaintiff was disproved to originate either by prescription or grant, in one or other of which ways it could alone be sustained; the origin of it being shewn to be in this agreement. But the plaintiff's counsel objected to the evidence being received, without proof at least that the plaintiff held one of the same copyhold tenements, for which the copyholders in 1698 signed that agreement. But the learned Judge admitted the evidence: and as it went to shew that the right of common insisted on by the plaintiff ori-

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CHAPMAN *against* COWLAN.

(a) This was to the effect following —

" Agreement, dated 20 *April* 1717—Indorsed—Copy Stint of *Crowle* Commoners.—Reciting, that all the commonable grounds, belonging to *Crowle* and other places, were antiently used by the commoners as common appurtenant to their tenements for all sorts of cattle, at all times of the year. But since the draining and approvement by the then lord and certain undertakers, now called Participants, who have inclosed about a third part thereof, and now do and ever since have enjoyed the same, the commoners were sensible that the remaining part of their common left them by the undertakers, if used by them in the same manner they as is aforesaid had done as when they had the whole, would not maintain that stock of cattle; therefore as to some part of the common, as hereinafter mentioned, they agreed to a certain stint, &c. which has been observed, &c. That by an instrument, dated 6th of *January* 1698, signed by a great many persons, commoners in the places aforesaid, consisting of several articles, &c. it was agreed that the major part of the inhabitants, who had right of common, might alter, revoke, annul, &c. and constitute others. And whereas the major part of the commoners have by former experience found it necessary to explain and make alterations," &c.—Then they proceeded to make certain alterations; and the articles not altered were declared in force.

ginated

1810.

CHAPMAN *against* COWLAN.

ginated in a private agreement between the copyholders who figned it, he directed a nonfuit; which

Vaughan Serjt. now moved to fet afide, upon the inadmiffibility of the evidence, as againft the plaintiff, who was not proved to claim under any of the parties to that agreement: and it not even appearing that the inftrument was figned by a majority of the then copyholders, fo as to fhew what the ancient right was generally acknowledged to be.

Lord ELLENBOROUGH C. J. Is not the inftrument evidence at leaft of the reputation of the manor at that time as to the prefcriptive right of common, againft the right now fet up by the plaintiff? It deftroys the right infifted upon by the plaintiff, by fhewing what the prefcriptive rights of the copyholders were before. And, as an agreement, it could have no effect to bind fubfequent copyholders, but only thofe who executed it. It will be better to recur to the original right of common as reftricted by levancy and couchancy.

The other Judges concurring,

Rule refufed.

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BLEWITT *against* HILL.

Friday, Nov. 9th.

A vessel hired by the lords commissioners of the admiralty, and employed to cruize against smugglers, the master and crew of which were appointed by the owner, but which was placed under the superior command of a captain appointed by the board, is forfeitable for an act of smuggling committed on board by such admiralty captain, as well as by the owner's master and crew. And the owner has his remedy over by act on on the case against such admiralty captain to recover damages for the loss of his ship by the condemnation, though that proceeded upon acts of smuggling stated to be by persons unknown; and though it appeared in fact that the master and mate appointed by the owner were also concerned in acts of smuggling on board.

THE declaration stated, that the plaintiff was owner of a certain ship in the employ of the lords commissioners for executing the office of lord high admiral; that the defendant was the captain and commander, and had the conduct thereof under the direction of the said commissioners, and the command and ordering of the crew employed for navigating the same; and that he wrongfully employed the said ship in the illegal importation of smuggled goods, &c., whereby she became forfeited and was condemned, and the plaintiff was obliged to pay a certain sum of money in order to procure her restoration. It appeared in evidence at the trial before *Bayley* J. at *Bodmin*, that the vessel had been taken up by the admiralty to cruize against smugglers: that *Tinney* the master and *James* the second mate were appointed by the plaintiff, and that *Hill*, the defendant, was appointed commander by the admiralty: that she made several captures on her cruize; during which time the defendant was privy to many smuggled articles brought on board, several of which were proved to be for his own use. The judgment of condemnation in the Exchequer against the ship was proved, which stated the smuggling to be by a person or persons unknown, and there was no judgment against *Hill* personally. Pending that suit the present plaintiff came in and claimed the ship as his property. The learned Judge being of opinion that the defendant was answerable for the damage sustained by the forfei-

ture

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BLEWITT *against* HILL.

ture and loſs of the ſhip occaſioned by his wrongful act; the plaintiff obtained a verdict for 2150*l.*, the amount of ſuch loſs. And now,

Burrough moved, by leave, to ſet aſide the verdict and enter a nonſuit, on the ground that the defendant was not placed in ſuch a ſituation on board the ſhip, as that ſhe could be forfeited by any act of his. He was placed there by the lords of the admiralty acting on behalf of the king; but the ſhip remained in the poſſeſſion of the owner repreſented by the maſter and crew: the defendant's acts therefore could not produce a forfeiture. And when it appears that the maſter and other perſons on board in the defendant's employ committed acts of ſmuggling, as well as the defendant, the forfeiture of the ſhip muſt be attributed to the acts of thoſe for whom the owner was liable, and not to the act of the defendant placed there by the crown, for whom the owner was not liable. [*Groſe* J. There was ſometime ago in the Exchequer an inſtance of a condemnation of a ſhip on a ſimilar ground.] There is no doubt made of the propriety of the condemnation in this caſe; for the acts of the plaintiff's own ſervants were ſufficient to warrant it. [*Bayley* J. It was the miſconduct of the defendant which occaſioned the forfeiture.] It was owing as well to the miſconduct of the other perſons on board the ſhip. There were acts of ſmuggling proved againſt the maſter and mate appointed by the plaintiff.

Lord ELLENBOROUGH C. J. By whomſoever the defendant was appointed, if by his act the plaintiff's property was forfeited, the plaintiff has his remedy againſt him.

him. The thing itself is forfeited by whomsoever used: and it is no excuse to the defendant that he conspired with others to do the wrongful act.

1810.

BLEWITT *against* HILL.

Per Curiam, Rule refused.

HALLET *against* MEARS and Another.

Friday, *Nov.* 9th.

One who is subpœnaed as a witness, and attends at the trial, but there refuses to give evidence unless his expences are paid, and is thereupon not examined, may yet maintain assumpsit for his necessary expences of attendance against the party who subpœnaed him. There was also evidence of a promise to pay the expences at the time of serving the subpœna; which it was contended was waved by the subsequent refusal to be examined.

THE present defendants had formerly brought an action against a third person, at the trial of which they had subpœnaed the present plaintiff to attend as a witness. The plaintiff accordingly attended at that trial, but refused to be examined, unless he was paid his expences: this was not done, and therefore he was not examined as a witness: but he afterwards brought this action of assumpsit for work and labour, expence of journies, and attendance, in consequence of the subpœna: and upon proof of these facts, and also upon slight evidence of a promise by the defendants to pay his expences when he was served with the subpœna, he recovered a verdict at the last assizes at *Chester*. And now,

Yates moved to enter a nonsuit; contending that there was no foundation for maintaining the action either upon the express or upon an implied promise: not upon the evidence of the promise in fact, because he had waved it by refusing to be examined at the trial unless his expences were then paid; and therefore the consideration of the promise, if any, namely, the attending *and giving evidence*, was not complied with. Nor upon an implied promise; for there was no tender of his expences when he was served with the subpœna, and therefore he could not have been

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been attached (*a*) for non-attendance at the trial: nor was there any remedy against him under the statute (*b*), as

(*a*) Vide *Tidd's Prac. ch.* 35. which cites *Chapman* v. *Pointon*, 2 *Stra.* 1150. *Bowles* v. *Johnson*, 1 *Blac.* 36. and *Fuller* v. *Prentice*, 1 *H. Blac.* 49. All these cases agree, and the last of them distinctly states, that unless the whole necessary expences of the journey to and from the place of trial, and of the witness's necessary stay there be tendered with the subpœna, the Court will not grant an attachment for the non-attendance of the witness at the place of trial. What shall be the measure of necessary expences, is stated somewhat more largely in Mr. *Ford's* MS. note of *Chapman* v. *Paynton*, *E.* 14 *G.* 2.—*Ryder* and *Fletcher*, two witnesses, were subpœnaed 8 miles beyond *Chester* to attend in town at the trial of this cause, and 2 guineas each were tendered to them, but they refused the money; objecting that it was too little: the summoner denied giving them any thing more; on which the witnesses neglected to attend. It was sworn that a horse could not be hired for the journey under 1*l.* 8*s.* And now upon a motion for an attachment against them, it was insisted they might have come on foot, or in a cart; that there was no necessity for a horse; and if they had hired horses, such expences must have been paid before the witnesses would have been obliged to be sworn, and therefore they ought to have come up.

Sed *per Cur.*—A man is not bound to trust for payment upon the trial. The party who would have the benefit of a witness's testimony must tender him sufficient to bear his charges backwards and forwards, or otherwise he is not obliged to attend. The design of the witnesses to travel on horseback was reasonable. And it was said that the directions of stat. 5 *Eliz. c.* 9. which requires a tender of reasonable charges *, was the guide of the Court in cases of this kind; that the sum tendered here was much too small; and so the rule was discharged.

Wright J. said, that in the Court of Common Pleas an attachment against witnesses for not attending in pursuance of a subpœna was never granted, but had often been refused; and though this Court would censure a witness, yet if it was doubtful whether the sum tendered was sufficient, the Court ought to leave the party injured to his remedy at law. That they ought not in process of contempt to be balancing too nicely the expences of travellers. That if a witness insisted on riding post, he did not know the Court ought to grant an attachment for his non-attendance, if the person requiring his attendance refused to accommodate him with such a passage: and that the only true foundation to grant an attachment was some obstinacy or contempt in the party.

(*b*) 5 *Eliz. c.* 9. *s.* 12.

* The direction of the statute is to tender to the party, "according "to his countenance or calling, such reasonable sums for his costs and "charges as, having regard to the distance of the places, are necessary to "be allowed in that behalf."

 where

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where a guinea was paid to and accepted by the party ſubpœnaed at the time, with a promiſe to pay the reſidue (*a*).

But *the Court* held that the action well lay: the witneſs obeyed the ſubpœna, and attended at the trial, and was ready and willing to have been examined if the defendant who ſubpœnaed him would have paid him his expences; and it was the defendant's own fault that the witneſs was not examined. They therefore

Refuſed the rule.

(*a*) *Pearſon* v. *Iles*, *Dougl.* 556. and vide *Goodwin* v. *Weſt*, *Cro. Car.* 522. there cited. In the former caſe the action was of debt upon the ſtatute 5 *Eliz.* c. 9. and was brought to recover, as well the penalty of 10*l.* thereby given for the non-attendance of the witneſs ſubpœnaed, as alſo the *further recompence* directed by the ſame ſtatute to be yielded to the party grieved, "by the diſcretion of the judge of the Court out of which the proceſs "ſhall be awarded." This further recompence, it was decided, muſt be aſſeſſed by the Court out of which the proceſs iſſued, and not by the judge or jury at niſi prius. The current of actions noticed in the books for this ſpecies of default is upon the ſtatute: But Lord *Manſfield*, in the laſt-mentioned caſe, ſays, "An action will lie for *damages* againſt a material witneſs who abſents himſelf without any excuſe: but that muſt be an action on the caſe."

1810.

Friday, Nov. 9th.

TEMPEST *against* RAWLING.

An instrument, *executed on the 24th of Nov.* 1807, upon an agreement stamp, setting forth the conditions of setting a farm, and the regulations to be observed by the tenant; that the term was to be from year to year, the lands to be entered upon on the 3d of Feb. 1808, and the housing on the 12th of *May*; and that *a lease was to be made upon these conditions with all usual covenants*; at the foot of which the defendant wrote "*I agree* "*to take lot* 1. (the premises in question) [illegible]*rent*, &c. "*subject to the* "*covenants*;" is an *agreement for a lease*, and not a *present demise*; there being not only a stipulation for a future lease, but time given to prepare it before the commencement of the term, and no present occupation as tenant contracted for. But after the defendant had been let into possession under such agreement, and had paid rent under it; held that that was sufficient to satisfy a count against him as tenant upon a *demise*, for mismanagement of the farm, contrary to the terms of such agreement; such count stating that whereas the plaintiff *had demised*, &c.

And held that it was not necessary to state the whole of the agreement, if the part omitted did not qualify that which was stated.

THIS was an action by a landlord against his tenant for mismanagement of a farm, contrary to certain stipulations agreed upon by him as stated in some of the counts, and against the rules of good husbandry, as laid in others. The first count, which was framed on the agreement, stated that whereas the plaintiff had *demised*, &c.: and the principal question turned upon the evidence, whether the instrument containing the contract between these parties, and upon which the defendant had been afterwards let into possession, and had paid rent, having only an agreement stamp of 16*s*. upon it, were a lease, or only an agreement for a lease? If the former, the stamp was not sufficient, and the evidence was not admissible. *Chambre* J. before whom the cause was tried at *York*, admitted the evidence, and the plaintiff recovered a verdict, with leave to the defendant to move to enter a nonsuit. The paper was entitled — Conditions of letting the four farms after mentioned, &c. — (which were offered in so many lots): and then it proceeded — The term to be from year to year — The lands to be entered upon on the 3d of *Feb.* 1808, and the housing on the 12th of *May* — and six months' notice to quit was to be given. Then, after stating certain regulations to be observed by the tenant, it proceeded — *A lease to be made upon these conditions, with all usual covenants*. And at the foot of the

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paper was written — *I agree to take lot* 1. (the premises in question) *at the rent of, &c. subject to the covenants.* This was signed by the defendant, and dated the 24th of *November* 1807.

J. Williams now moved to set aside the verdict for the plaintiff, and enter a nonsuit; contending that though a future more formal lease was to be made, yet as the parties had used words of present demise, this must be taken to be a present lease, and not merely an agreement for a lease; upon the authority of *Poole* v. *Bentley* (*a*).

Lord ELLENBOROUGH C. J. This is nothing more than an agreement for a lease which was to be made thereafter, and time was given to prepare it, before the term was to commence. In *Poole* v. *Bentley* the tenant was to have immediate possession, and to lay out money in building, and the rent was to commence immediately: here there was no immediate occupation to be taken by the tenant.

J. Williams then objected that the counts stated that the plaintiff *had demised;* whereas if the instrument were only an agreement for a demise and no present demise, it did not sustain the declaration. [But by Lord *Ellenborough* C. J. The plaintiff let the defendant into possession, and received rent from him.] Thirdly, he objected that the first count which stated the terms of the agreement most fully, only stated part of the stipulations, but not all of them: and that counts on a general assumpsit of good management cannot be sustained where there are particular stipulations.

(*a*) 12 *East*, 168.

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Lord ELLENBOROUGH C. J. It is enough to state that part truly which applies to the breach complained of, if that which is omitted do not qualify that which is stated (*a*).

Per Curiam, Rule refused.

(*a*) Vide *Howell* v. *Richards*, 11 *East*, 638.

Friday, *Nov.* 9th.

PICKARD *against* BANKES.

A stakeholder receiving *country bank notes* as money, and paying them over wrongfully to the original staker after he had lost the wager, is answerable to the winner in an action for *money had* and received to his use.

THE plaintiff had laid a wager with a third person, who offered ten guineas to one upon the event; and the defendant was the stakeholder. The plaintiff won the wager; notwithstanding which the defendant paid over the ten guineas to the other party, the original staker: whereupon the plaintiff brought this action for money had and received to his use, which was tried before *Chambre* J. at *York*, when the only question was whether *money* had been received by the defendant. It appeared that the deposit had been made in *Hull* bank notes payable to bearer, and not in coin of the realm; and the payment over to the other party was in notes of the same description. The learned Judge thought that these were to be considered as *money*, as between these parties; and therefore the plaintiff recovered a verdict for the amount. And now

J. Williams moved to set aside the verdict, and (by leave) to enter a nonsuit. Notes of this description, he said, were no more than common promissory notes or bills of exchange. If these were payable at a future day, they could in no sense be considered as *money*, but the time of payment

payment cannot alter the nature of the thing. The action should rather have been trover, or upon a special assumpsit. Mr. Justice *Lawrence* in a similar case at *Stafford* held that money had and received would not lie.

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Lord ELLENBOROUGH C. J. Provincial notes are certainly not money; but if the defendant received them as ten guineas in money, and all parties agreed to treat them as such at the time, he shall not now turn round and say that they were only paper, and not money. As against him, it is so much money received by him.

Per Curiam, Rule refused (*a*).

(*a*) Vide *post*, *Lowndes* v. *Anderson*; and *Solomons* v. *The Bank of England*, there cited.

ROBERTS *against* STACEY.

Monday, *Nov.* 12th.

The rule for judgment must have four clear days, exclusive of the first and last, and of *Sunday*, before judgment entered.

UPON a motion for setting aside the taxation of costs and the final judgment, and for discharging the defendant out of custody, the question was, whether sufficient time had been allowed between the rule for judgment, which was given on the 6th, and the signing of judgment, which was on the 11th, the last day of *Trinity* term; a *Sunday* also intervening.

The Court held, that the rule for judgment must have four clear days exclusive of the first and last, and also of *Sunday*, before judgment can be signed; and therefore made the

Rule absolute (*a*).

Marryat in support of the rule. *Adolphus* contrà.

(*a*) 1 *Imp. Prac.* 420. 7th edit. states the practice accordingly, and cites 3 *Salk.* 212.; with the addition, that a holiday, on which the Court does not sit, is not to be accounted.

Tuesday, Nov. 13th.

HANSON *against* BOOTHMAN and Others.

Where lessees of land, and of coal mines found or to be found therein, covenanted *forthwith to proceed to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries*, and as in such cases was usual and customary, and to erect fire engines for the purpose, by the 24th of *June* 1806; *or in default thereof, to pay so much to the lessor as arbitrators should award*: and after the day past, without any new pits sunk, &c., the parties named arbitrators to award concerning the damage, loss, and delay to the lessor, if any; and whether any rent or other satisfaction should be made to him on that account; and the lessees gave bond to the lessor conditioned to perform the award: and afterwards the arbitrators awarded *that the lessees had not performed their covenant*, by not having proceeded to sink for the said coal *as far as could and ought to be accomplished*, &c. (in the words of the covenant) on or before the 24th of *June* 1806, for which they awarded to the lessor 150*l.* on account of all damages and losses then incurred on account of such breach: and further, *that the lessees should sink coal mines, and erect fire engines for getting the coals demised on or before the 24th of* June 1807; and in default thereof, and *until the same should be done, they should pay a yearly rent of 200l. to the lessor* as a compensation for the lord's share reserved under the lease: held that to an action on the bond, it was a sufficient answer by the lessees to save the condition, that they had paid the 150*l.* awarded for the breach of the covenant up to the 24th of *June* 1806; and as to the subsequent period from thence till the 24th of *June* 1807, that on divers days between &c. *they did well and truly sink for coal in the lands demised as far as could and ought to be accomplished*, &c. (in the words of the covenant) and were ready and willing to have sunk and completed the pits, and to have erected the necessary fire engines, &c. within the time limited by the award; *that at the time of making the lease, and from thenceforth, there were no mines of coal under the lands as could or ought to be worked by any person acquainted with the nature of collieries, or as in such cases it was usual or customary to work, or as would have defrayed the necessary expences of working and getting the same: all which premises the defendants ascertained and proved by due and sufficient experiments and trials then and there made.*

But leave was given to amend by taking issue on the sufficiency of the experiments.

DEBT on bond for 5000*l.*, dated 16th *August* 1806, with a condition, reciting, that whereas by an indenture of lease dated the 5th of *July* 1805, the plaintiff demised to the defendant, for 57 years, all the mines of coal then already found, or which should or might thereafter be found, in any part of the plaintiff's estate within *Pendlebury* in *Lancashire*; subject, inter alia, to a covenant, that the defendants would forthwith proceed to sink for coal in the wood and low lands, as far as could and ought to be accomplished by persons acquainted with the nature of collieries, and as in such cases was usual and customary, and immediately erect such fire engines as should be necessary for the above purpose; such pits to be sunk and fire engines to be erected ready and complete for working the veins and getting the coal on or before the

24th of *June* 1806: *or in default thereof to pay to the plaintiff such sum, &c. as should be fined by arbitration or umpirage.* And it was agreed that in case of any difference between the parties, which should not be settled between themselves within one month, the matter of difference should be referred to two arbitrators, or in their default to an umpire, who should award what should seem to them to be just, &c. And further reciting the complaint of the plaintiff that the defendants had made default in the performance of the covenant in the lease; and that the parties had agreed to submit the differences between them on that account to two arbitrators named, (or in their default to an umpire): the condition was to abide and perform the award of the arbitrators (or umpire) of and concerning the damages, losses, and delays, if any, sustained by the plaintiff, on account of the defendants not having, as the plaintiff alleged, performed their covenants; and also whether any rent, payment, or other satisfaction, should be made to the plaintiff in respect of the premises, &c. The defendants, after oyer of the bond and condition, pleaded that the arbitrators made no award, but on the 3d of *Sept.* 1806 appointed an umpire, who made his award on the 29th of *Sept.*, by which he awarded that the defendants had *not performed* their covenants in the lease, *inasmuch as they had not proceeded to sink for the said coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries, and had not erected such fire engines as were and are necessary for the working the mines and getting the said coals, and compleated the same for that purpose on or before the 24th of* June 1806: and he awarded that in consequence of the non-performance and breach of such covenant in the lease, and in satisfaction of all losses, damages, and delays *hitherto* sustained by the plaintiff on account of such breach, the defendants should pay

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pay to the plaintiff 150*l*. for and as a rent, and in lieu of the lord's part made payable by the said lease for the year ending the 24th of *June* 1807: *that the defendant should sink to and through the coal mines demised, and erect fire engines* thereon ready and complete for working the said mines and getting the coals, according to the tenor of the lease, *on or before the 24th of* June 1807: and in *default thereof* he awarded that *until the same should be so done, the defendants should pay to the plaintiff the yearly rent of* 200l., *as a compensation and in lieu of the lord's rent or share reserved by the said lease*, payable on the 24th of *June* and 25th of *December*; the first half-yearly payment to become due on the 25th *Dec.* 1807: and that so soon as the defendants should have sunk the said pits, erected such fire engines, and began to get the said coals, according to the tenor and effect of the lease, the said annual rent or compensation should cease, and the defendants should begin to pay the lord's rent or share reserved by the lease, according to the quantity of coal from time to time gotten; and that when and as often as the lord's rent or share should exceed 200*l*. in one year, the defendants should retain the overplus until they had reimbursed themselves the whole of what they should have paid by way of annual rent or compensation in lieu of the lord's rent before the colliery was begun to be worked, &c. The defendants then averred, that in consequence of the non-performance and breach of covenant as in the award mentioned, and in satisfaction of all losses, damages, and delays thitherto sustained by the plaintiff on account of such breach, they paid to him the 150*l*. in the award mentioned, on the 25th *Dec.* 1806, and 24th of *June* 1807, according to the form and effect of the award: and that after the making of the award, and before the 24th of *June* 1807, viz. on the 1st *Oct.* 1806, and on divers other days be-

Averment of satisfaction for past breach;

and as to subsequent breaches; that proper trials were made;

tween

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tween that and the 24th of *June* 1807, *they did well and truly sink for coal in the wood and low lands demised, as far as could and ought to be accomplished by persons acquainted with the nature of collieries, and as in such cases was usual and customary, and were ready and willing to have sunk to and through, and would have sunk to and through the said coal mines, and to have completed, and would have completed such pits, and to have erected and completed, and would have erected and completed such fire engines as should or might be necessary for working the said mines and getting the said coals,* within the time limited by the award; *but that at the time of making the said lease, and continually from thenceforth hitherto, there were not nor are any such mines of coal in or under any part of the plaintiff's lands within* Pendlebury *aforesaid as could or ought to be worked or gotten by any person acquainted with the nature of collieries, or as in such cases it was or is usual or customary to work or get, or as could or would have defrayed the necessary expences of working and getting the same: all which premises the defendants ascertained and proved by due and sufficient experiments and trials then and there made;* and gave notice thereof to the plaintiff; by reason whereof the defendants were prevented from sinking to and through the said mines, and from completing the said pits and engines within the time in that behalf limited by the award. There was another plea in substance the same: to both of which the plaintiff demurred generally.

but that there were no coal-mines in the lands fit for working.

Littledale, for the plaintiff, insisted that the pleas did not contain any sufficient excuse for the non-performance of the award by the defendants. The parties referred to the umpire whether the covenant had been broken; and he has decided that it was broken, by the defendants not having

proceeded

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proceeded to ſink for coal as far as they could and ought to have done: that decides the queſtion as to the breach of the condition: and then he awards that the defendants ſhall ſink pits for coal, &c.; and that, until coal ſhall be gotten, they ſhall pay a certain rent to the plaintiff. This is is no exceſs of the umpire's authority: he does not award any thing impoſſible to be done; for the defendants may ſink the pits, though it may not be effectual for the purpoſe of getting coal: and it is no anſwer, againſt the award of the umpire as to the breach of the covenant, to ſay that there are no coals, or none worth the expence of getting, under the demiſed premiſes.

Lord ELLENBOROUGH C. J. It might be no anſwer to the damages awarded for the breach of covenant for the time paſt, in not trying to get the coal, &c. on or before the 24th of *June*: but ſurely it is an anſwer to any future breach, that they had tried as far as they could and ought to do in the judgment of perſons of competent ſkill in ſuch works, and as far as was uſual and cuſtomary in ſuch caſes, and that no coal could be gotten. It is found upon competent trial to be impoſſible to get any coal fit to be worked; and no perſon can be bound to do impoſſibilities.

The other Judges agreed; and *Bayley* J. ſuggeſted that it would be better for the plaintiff, if the caſe would bear it, to take iſſue upon the ſufficiency of the experiments made by the defendants: and leave was given to amend for that purpoſe, if upon inquiry it ſhould be found there was any ground for it: otherwiſe,

Judgment for the Defendants.

Richardſon was to have argued for the defendants.

Sir FRANCIS BURDETT, Bart. *againſt* COLMAN.

Tueſday, Nov. 13th.

The SAME *againſt* The Earl of MOIRA.

Where the ſame plaintiff brought three actions of treſpaſs againſt three ſeveral defendants for different parts which they took in the ſame tranſaction; one againſt the Speaker of the Houſe of Commons, who juſtified under a warrant iſſued by him under the order of the Houſe, for arreſting and committing to the Tower the plaintiff, a member of the Houſe, for a breach of privilege in publiſhing a libel upon the Houſe; to which juſtificatory plea the plaintiff demurred: another againſt the Serjeant at Arms; who pleaded not guilty, and alſo juſtified under the authority of the Speaker's warrant; to which the plaintiff replied an exceſs in the manner of executing the warrant, by a military force, and with improper and unneceſſary violence; on which iſſue was joined to the country: and the third againſt the Conſtable of the Tower, who received and detained the plaintiff as a priſoner; and who alſo juſtified under a warrant from the Speaker for that purpoſe; in which iſſue was alſo taken to the country on ſeveral facts ſtated in ſuch juſtification: and notice of trial was given by the plaintiff in the two laſt cauſes, (which ſtood for trial at bar on a day fixed;) but the plaintiff, though ſtill within time by the general rules and practice of the Court, had not ſet down his demurrer in the firſt cauſe for argument: the Court, on motion of the Attorney-General on behalf of the Serjeant at Arms, and of the Conſtable of the Tower, poſtponed the trial of the iſſues in thoſe cauſes until after the argument on the demurrer in the cauſe againſt the Speaker; becauſe the right, juſt, and diſtinct conſideration of the queſtions which aroſe on the iſſues of fact, and on the true meaſure of damages, in the cauſes againſt the Serjeant at Arms and the Conſtable of the Tower, depended mainly upon the deciſion of the iſſue in law joined in the other action againſt the Speaker: and though the ſame queſtion of law might ultimately be raiſed on motion in the two former actions, yet it could not be conſidered ſo conveniently to the Court, to whom the deciſion of ſuch queſtion belonged, or ſo advantageouſly to the party who ſhould prove to be in the right, as upon the demurrer, which preſented the queſtion of law diſtinct from the queſtions of fact.

THE Houſe of Commons having in the courſe of the laſt ſeſſion of parliament voted that Sir *Francis Burdett*, Bart. a member of that Houſe had been guilty of a breach of privilege in the publication of a libel againſt the Houſe, and that he ſhould be committed to the Tower of *London*; Mr. *Abbott*, the Speaker, iſſued his warrant directed to Mr. *Colman* the Serjeant at Arms, to arreſt and convey, and to the Earl of *Moira*, as Lieutenant and Conſtable of the Tower, to receive and keep Sir *Francis* in his cuſtody, &c.: which warrant was afterwards executed by Mr. *Colman*, (aſſiſted in the progreſs of the proceeding by the civil and military powers which were called out to preſerve the peace of the metropolis,) by breaking into the houſe of Sir *Francis* in *Piccadilly*, after

notification

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notification of the business, and demand and refusal of admission, and by arresting him there, and taking him to the Tower, where he was received and detained in custody by the Earl of *Moira* as Constable of that fortress; from whence he was liberated immediately upon the prorogation of parliament. In consequence of this proceeding Sir *Francis* brought three actions; one against Mr. *Abbot* the Speaker, another against Mr. *Colman* the Serjeant at Arms, and the third against the Earl of *Moira*.

The action against the Speaker was for trespass, assault, and false imprisonment, and for breaking open the plaintiff's house. To which the defendant pleaded in substance, that there was a parliament held at the time and previous to the commission of the supposed trespasses; that the defendant was a member of that parliament, and Speaker of the House of Commons; that the plaintiff was also a member; that the House of Commons resolved that a certain letter published was a libel upon the House, and that the plaintiff, having admitted that he was the author of the publication, was guilty of a gross breach of the privileges of the House; and that the House therefore ordered that he should be committed to the Tower of *London*, and that the Speaker should make out his warrant accordingly. That the defendant accordingly made out his warrant to Mr. *Colman* the Serjeant at Arms, requiring him to take the plaintiff into custody, and to deliver him over to the custody of the Lieutenant and Constable of the Tower; and another warrant to the Lieutenant and Constable of the Tower to receive the plaintiff as his prisoner. That the first warrant was delivered to Mr. *Colman* the Serjeant at Arms, who went to the plaintiff's house, where the plaintiff was, for the purpose of arresting and delivering him into the custody of the Constable of the

Tower;

Tower; that the outer door of the houſe was ſhut; that the Serjeant gave notice of the cauſe of his coming, and required the door to be opened; that the door was not opened; whereupon with ſuch force as was neceſſary for the occaſion he broke into the houſe and took the plaintiff and conveyed him to the Tower, and there delivered him to the Conſtable of the Tower: and that the Serjeant at Arms did all this under the warrant. There was alſo another juſtification pleaded by the Speaker, omitting the breaking of the houſe. To each of theſe juſtifications, there was a demurrer.

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To the like action brought againſt Mr. *Colman* the Serjeant at Arms, he pleaded not guilty, and alſo a ſpecial juſtification, ſubſtantially the ſame as the firſt pleaded by the Speaker. To this juſtification the plaintiff replied, that the defendant *Colman* wrongfully and injuriouſly with force and arms, and with a large military force of the king armed with dangerous and offenſive weapons, which was uſed by the defendant in and for the execution of the Speaker's warrant, and which military force was improper, exceſſive and unneceſſary for the purpoſe, and in an unreaſonable manner and more violent than was neceſſary or proper in or for the execution of that warrant, to the great terror and alarm of the plaintiff, broke and entered his meſſuage, &c. and aſſaulted and laid hands upon him and forced him to proceed to the Tower of *London*, &c. In anſwer to this and to a ſimilar replication to another ſimilar plea, the defendant *Colman* rejoined that he did not commit the ſeveral ſuppoſed treſpaſſes or any of them with ſuch military force as was improper, exceſſive, or unneceſſary for the execution of the warrant, nor in an unreaſonable manner, and more violently than was neceſſary or proper in or for the execution of that warrant, on which there were iſſues.

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To the third action, which was for trespass and false imprisonment, against the Earl of *Moira*, his lordship pleaded the holding of the parliament, &c. (as in the other case;) and further, that he was Lieutenant and Constable of the Tower; that all prisoners committed to the Tower are under his control and superintendance; and (after stating the warrants of arrest and safe custody) that the plaintiff was taken under the first, and delivered to him under the other; and that he as Lieutenant and Constable, &c. received and detained him. The replication, admitting some of the facts stated in the plea, and protesting against others, alleged that the Earl, of his own wrong and without the *residue* of the cause alleged, committed the trespass, &c.; thereby putting in issue, the execution of the warrant, the delivery of the person to the Lieutenant of the Tower, the keeping him in the custody of the Earl as Constable, &c. and the fact of the Earl being Constable.

The declarations in these causes were delivered in *Easter* term last on the 12th of *May*; on the 16th the special pleas were put in. *Easter* term ended on the 4th of *June*. On the 20th of *June*, between the essoign day and the first day of *Trinity* term, the plaintiff was ruled to reply: on the 26th the demurrer was filed in the Speaker's case; and on the next day the Speaker joined in demurrer. *Trinity* term ended the 11th of *July*; but the demurrer was not entered for argument in that term, nor up to the time when the motion after stated was made by the Attorney-General. But issue having been joined in the other causes, *The Attorney-General* in *Trinity* term moved for trials at bar; which were granted; and the trial of the cause of *Burdett* v. *Colman* stood for the 20th of *November* in this term, and notice of trial was given in that cause, and in the

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the cause of *Burdett* v. *The Earl of Moira*; when on *Thursday* the 8th of *November* the following rule was granted by the Court upon the motion of *The Attorney-General.*

" *Burdett*, Bart. against *Colman* — Upon reading the issues joined in this cause to be tried by the country, and the pleadings and demurrers, issues at law joined in another cause now depending in this court, in which the said Sir *Francis Burdett*, Bart. is plaintiff, and the Right Honorable *Charles Abbot*, Speaker of the House of Commons, is defendant, it is ordered that the plaintiff upon notice of this rule to be given to his attorney shall upon *Monday* on the morrow of *St. Martin* shew cause why the trial of the issues in this cause should not be put off until some day to be fixed by the Court after the demurrer in the said cause of *Burdett* against *Abbot* shall have been argued. Upon the motion of Mr. Attorney-General.

By the Court."

There was a similar rule in the cause of *Burdett* against *The Earl of Moira*; which, in addition to the grounds stated in applying for the rule in the cause against *Colman*, was further supported by an affidavit of the absence of a material witness, Mr. *Colman*, who was upon military service in *Portugal*, and could not return in time.

The Attorney-General, in applying for these rules, after stating the pleadings in each, so far as to shew what the general question was which arose on the demurrers in the action against the Speaker, and how the collateral questions branching out of that were raised by the several issues to the country in the other causes, insisted that these latter were so intimately connected with and depended so materially upon the decision of the general question, respecting

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ing the legality of the Speaker's warrant, that it would be extremely inconvenient and embarrassing to the Court, the jury, and to the parties, to proceed to the trial of those issues at the bar of the court, until the general question raised by the demurrers was decided. He contended that the only issue upon the rejoinder to the plaintiff's replication to the special plea in the cause of *Burdett* v. *Colman*, and which issue was joined in the terms of the replication, was upon the excess in the manner of executing the warrant with a military force, and with more violence than was necessary or proper: and therefore for that purpose the warrant itself must be taken to be good, and no question could be made as to the legality of breaking into the house: which questions as to the legality of the warrant, and of the breaking into the house for the purpose of executing it, under the circumstances, were raised by the demurrers in the action against the Speaker; and the first of these two was necessarily preliminary to any question of excess in the manner of executing the warrant; and by those demurrers the plaintiff has shewn that he means to dispute its legality. But though in the terms of the special issue in the cause of *Burdett* v. *Colman* the only question raised is as to the excess; yet notwithstanding the defendant should have a verdict in his favour on that issue, the plaintiff might still move, on having a verdict on the general issue, to enter judgment for himself on the record, upon the ground that the plea was bad in law: and if the Court should be of that opinion upon the demurrers, the trial at bar upon the issue as to the excess will have been wholly nugatory. He also referred to the dates of the several proceedings in the cause, to shew that on the part of the defendants he had done every thing to expedite the plaintiff's suits; and stated that the plaintiff might

might if he had pleased have entered the demurrers for argument in the last term, but that they were not even now entered; and he offered to wave the present application if they were entered immediately, and argued on either of the two intervening civil paper days before the 20th, when the cause against *Colman* stood for trial at the bar.

Shepherd Serjt. now shewed cause against the first of these rules; admitting that the other must be made absolute, upon the affidavit of the absence of a material witness. The first rule, he observed, was drawn up upon reading not only the issues joined in the particular cause, but also the issues joined in law in the action brought by the same plaintiff against the Speaker Mr. *Abbot*, which supposed a connexion to exist in the matter of the two causes: and it was stated as part of the ground of the motion, that when the declarations in these two causes were filed, the defendants pleaded, without applying to the Court for further time, as they might have done in the ordinary course of proceeding; and that in the Speaker's cause, the plaintiff was ruled to reply before he filed his demurrers: that in *Colman*'s cause as soon as the plaintiff replied to the pleas, the defendant took issues and afterwards gave notice of trial, without delay; but that the plaintiff has not set down the demurrers for argument in the Speaker's cause, which involve, it is said, the principal question in *Colman*'s cause. It is not however pretended that the plaintiff has been guilty of any default in not going on with all practicable expedition in *Colman*'s cause; and no supposed delay in the other can lay a ground for postponing the trial in this cause. In truth however the plaintiff in both causes has conformed to the

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rules of practice laid down by the Court; for he is yet within time by those rules to set down his demurrers for argument in the Speaker's cause; and therefore no default or delay is imputable to him, upon which any proceeding can be grounded to interfere with the ordinary course of the cause. Where by the rules of the Court a certain time is allowed to the suitors for doing certain acts, it is presumed that the whole of that time may be necessary for the purpose of doing the acts with due deliberation; and it is only when they exceed that time, that the adverse party can take any advantage of it to expedite the proceeding. And if this hold good in the same action, a fortiori it must when alleged as a ground for delaying proceedings in another action by the same plaintiff. It can be no reason for postponing the trial of the issues in this cause, that the plaintiff has not set down his demurrers for argument in the other cause within a time when he was not bound by any rule or practice of the court to set them down. It is true that by comparing the records in the two causes of *Burdett* v. *Colman* and *Burdett* v. *Abbot*, some questions of the same nature may arise in each; but there are other questions which may arise in the former, quite distinct from those which are common to both. The demurrers in the cause against the Speaker will indeed raise the same question as to the privilege of the House of Commons to commit, which may also be raised in the cause against *Colman*; but other questions may arise in the latter case as to the validity of the warrant and the mode of executing it. And it may also be said that one of the pleas in the action against the Speaker, which admits that the door of Sir *Francis Burdett*'s house was broken open by the order and direction of the Speaker, will raise the further question, whether supposing the privilege of the

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Houſe to be ſuch as is aſſerted, and the Speaker's warrant to be legal in the frame of it, there was ſtill authority to break open the door; which queſtion would not have ariſen if the defendant in that action had only juſtified the aſſault and not the treſpaſs in breaking open and entering the houſe. But beſides thoſe queſtions, other queſtions may ariſe in the trial at bar, as to the mode of executing the warrant, and the degree of exceſs, which cannot be decided upon the demurrers. So far only the deciſion of the principal queſtion in the cauſe againſt the Speaker might, if favourable to the plaintiff, ſuperſede the neceſſity of trying in the trial at bar the iſſue as to the exceſs in the execution of the warrant; that though ſuch iſſue were found for the defendant, yet if the general iſſue were found for the plaintiff, it would be open to the plaintiff's counſel to contend that the Speaker's warrant would not juſtify any part of the treſpaſs; and that notwithſtanding ſuch finding by the jury for the defendant on the iſſue as to the exceſs, judgment ought to be entered on the whole record for the plaintiff. But it is in one event only that this conſequence would enſue; and the plaintiff may chuſe to proceed firſt in that action, which will embrace the whole ſcope and merits of the queſtion. If one of the cauſes were pending before a different tribunal, particularly if it were a court of error in which the judgment of this court might come to be reviſed, this Court might of their own accord, as they have ſometimes done, ſuſpend giving judgment, or even ſuſpend hearing the arguments, until the opinion of the other tribunal upon the ſame point has been declared; though even that has not been thought to be a ſufficient ground for a ſpecific motion by one of the parties to poſtpone the proceedings in this court. But it can afford no colour for ſuch a poſtponement

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that the same question may come before the same Judges, in another cause: for admitting that the other questions were identically the same, the Court would only be waiting to have the benefit of their own judgment in another cause. But the trial at bar will embrace all the questions, and there can be no more difficulty in taking the opinion of the whole Court in this mode, than upon the demurrers. Then, if the trial at bar should proceed, and the verdict should be for the plaintiff, with the advice of the Court on the matters of law, the question will be at rest. If indeed the verdict on the special issues should be for the defendant, the same question which will arise upon the demurrers in the other cause may be raised in this, by motion to enter judgment for the plaintiff on the general issue, notwithstanding such finding. For if the special pleas be substantially bad, the judgment for the defendant would be erroneous where there was a verdict for the plaintiff on the general issue: and that would equally be the subject of examination on a writ of error, as in the other case where the question was immediately raised upon the demurrers. But whichever way the judgment of the Court may be, upon the demurrers, the party against whom it is given, if dissatisfied, may carry the cause to a court of appeal, and the trial at bar must still proceed. In the ordinary course of things a plaintiff has a right to marshal his own proceedings, provided he conform to the rules and practice of the Court; and the Court will never interfere with this privilege, much less assist the defendant in marshalling the plaintiff's proceedings, unless it were to prevent some great and extraordinary failure of justice which would otherwise ensue; for which purpose no doubt the Court would interfere and mould their proceedings accordingly: but nothing of that sort is pre-

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tended in this case: for there seems no possible advantage or disadvantage to either party by adhering to the ordinary course of proceeding. But assuming that the course proposed by the rule would be more convenient to the defendant; yet as the plaintiff has a right to insist that the regular course is the more convenient one for himself, the Court will not interfere to deprive him of his right to set down for trial his action against *Colman* before he sets down for argument his demurrers in the action against the Speaker, where he solicits no favour, and has been guilty of no default in either: and it must be a matter of indifference to the Court in which cause they are first called upon to deliver their opinions upon the same question. [*Bayley* J. Will it not be a question on the trial at bar whether the plaintiff is to recover damages for the whole trespass and injury, or only for the excess upon the special issues; or are the jury to assess both descriptions of damage? Would it not therefore be more convenient, that the general question raised by the demurrers should be first decided?] If the defendant were guilty only of an excess in the execution of the warrant, he would be a trespasser ab initio; which would entitle the plaintiff to damages, generally, for the whole trespass. But even if that were otherwise, the plaintiff ought not to be deprived of his choice of proceeding for damages for the excess only; with which, without anticipating any such intention, he might hereafter be content. If it be asked whether the plaintiff will consent to abandon the demurrers, the answer is, that the defendant has no right to drive the plaintiff to make an election: nor can it answer any purpose of justice to the defendant, of which he would otherwise be deprived, to postpone the trial of this cause till the other is decided. Upon the whole, it is enough for

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the plaintiff, who has conformed his course of proceeding to the known rules and practice of the Court, who has been guilty of no default or delay, and applies for no indulgence, to say that he is ready and desirous to proceed in the trial at bar of this cause, and is not ready or desirous to proceed first in the argument of the demurrers in the other cause; and that he has a right to make his election.

The Attorney-General, in support of the rule, after observing that the defendants in the several causes had done every thing in their power to expedite the plaintiff's proceedings, said that the ground of this application was not any alleged delay on the part of the plaintiff, which was imputable to him as a fault; nor was the object of it to impede the plaintiff's proceeding, or advance that of the defendant in this cause; but it is an application to the Court in the ordinary course, so to arrange the trial of the several causes, which are substantially the same, as will best promote the convenience of the Court, and the ultimate attainment of justice in the discussion and decision of the several questions which arise out of them, and which are necessarily and ultimately connected with each other; and this, without prejudice or benefit to either party. On the contrary, the granting of the rule will be a benefit to both parties; for as each thinks himself in the right, it must be the interest and object of each to bring the real points in the case before the Court in the most perspicuous course for decision. The only question then can be, as to the real convenience and perspicuity of the course proposed by the rule, in preference to that desired to be pursued by the plaintiff. The two causes, that against the Speaker, and that against the Serjeant

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jeant at Arms, grow out of the ſame tranſaction; the plaintiff is the ſame in both; the defence of each is under the ſame control, and the ſame juſtification of the treſpaſs complained of has been put in to both. In the one action againſt the Speaker, the plaintiff has demurred to the full juſtification ſtated on the record, the whole of which he thereby aſſerts to ſtand without any juſtification in law. In the other againſt *Colman*, the defendant has, in point of law for the occaſion, admitted the legality of the whole juſtification; but he replies, that the defendant has been guilty of an exceſs in the execution of the warrant, and for that exceſs he ſeeks to recover damages. But notwithſtanding the apparent terms of the iſſue on this record, it is admitted that, though the jury ſhould find that iſſue for the defendant, thereby negativing any exceſs, it will ſtill be open for the plaintiff, and he means, to contend that the whole juſtification is bad in law. Then it is obviouſly the moſt convenient courſe for the Court itſelf, and for both parties, that the legality of the warrant iſſued by the Speaker, under the authority of the Houſe, which is the queſtion raiſed by the demurrers in the action againſt him, ſhould firſt be decided before the quantum of damages for the alleged exceſs of authority in the execution of that warrant, which is the queſtion raiſed by the iſſue joined in the trial at bar, can properly be decided. The meaſure of damages to be given againſt one who has violated the ſubſtantial principles as well as the forms of the law, in the arreſt and impriſonment of the plaintiff, muſt be manifeſtly different from that where the defendant has only been guilty of ſome irregularity in the form or exceſs in the manner of executing his duty, in a caſe where he intended to act legally in toto, and the principal object was legal. Then it is admitted, that

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if the jury should negative any excefs, the plaintiff will apply to the Court again upon motion to enter judgment for himfelf upon the whole record, notwithftanding fuch finding; and thereby raife the previous queftion now raifed upon the demurrers, whether he be not entitled to damages in toto; and this after the jury may have given damages for the excefs only: and thus the natural and convenient order of things will be reverfed. On the other hand all uncertainty and confufion will be avoided, by firft deciding the queftion of law upon the authority of the Speaker's warrant. If that be no juftification in law for any part of the trefpafs complained of, the courfe of the trial at bar will be clear; the plaintiff would be entitled upon the general iffue to go for damages for the whole trefpafs. But if that be a good juftification for any part of the trefpafs, then the jury would only have to confider, under the direction of the Court, in point of law, whether there had in fact been any excefs or not; and, if any, to affefs damages for fuch excefs. The Courts have always been accuftomed to exercife a difcretionary control over the courfe of proceedings as regulated by their own practice; and though the general rules of practice are thofe which govern ordinary occafions, yet if the ends of fubftantial juftice may be better promoted in particular cafes by varying from the common courfe, the Courts have always, upon application, exercifed their difcretion in moulding their proceedings accordingly.

Lord ELLENBOROUGH C. J. The Court in arranging their proceedings do not look fo much to the immediate wifhes or the immediate convenience of the parties, as to the ultimate juftice to be adminiftered between them, and the moft convenient mode of attaining it: and if

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upon the view of the queſtion, it ſhall appear to the Court that it will be very much more convenient to a full and clear adminiſtration of juſtice in this caſe; that it will be a ſaving of expence to all parties, and really beneficial to the party who now reſiſts it; the Court, notwithſtanding that reſiſtance, will feel itſelf obliged in juſtice to grant the application that is made. It is in all caſes deſirable that the courſe ſhould be made clear in point of law, and that the points of legal difference, if any, in the cauſe ſhould be diſcuſſed as far as they can be ſeparately and diſtinctly, before the trial of the iſſues in fact: and in many caſes where there have been the general iſſue and a demurrer upon the ſame record, the Court, with a view to the convenience of juſtice, has ordered the demurrer to be firſt argued, in order that the parties might not go to the trial of the iſſue under the neceſſity of aſſeſſing contingent damages; but that the judge, who may have to direct the jury, may do ſo without heſitation as to the final meaſure of damages. I have myſelf found the inconvenience, and have had reaſon to complain of it no longer ago than the laſt ſittings, when an iſſue has come prematurely to be tried, where it was clear that the plaintiff could not ultimately have a farthing to recover. It is therefore convenient in ſuch caſes where there is an iſſue in fact to be tried, and upon the ſame record a demurrer embracing the ſubſtantial cauſe in litigation between the parties, that the demurrer ſhould be firſt diſcuſſed and decided. Taking the record in *Burdett* and *Colman* by itſelf, it does not indeed in terms preſent both a demurrer and a general iſſue, but in ſubſtance it does ſo: for when the learned counſel for the plaintiff candidly and very properly admits, that though the iſſue on the exceſs ſhould be found againſt him, yet if the general iſſue were

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found for him, he ſhould move the Court to enter judgment for the plaintiff; upon the ground that the facts ſpecially pleaded amount to no juſtification in point of law; would it not be manifeſtly more convenient for the Court, in order that they may know in what manner they are to direct the jury on that iſſue, to aſcertain firſt whether the juſtification relied on be a legal juſtification or not. For though, as is truly ſaid, the iſſue being on an exceſs of an authority in law, if there be an exceſs, the party is a treſpaſſer ab initio; yet very different indeed would be the meaſure of damages which the Court would adviſe if the party were guilty of a mere exceſs in the exerciſe of a juſt authority; or if he were guilty of a violent treſpaſs and outrage upon the liberty of his fellow ſubject, wholly inexcuſable and unjuſtifiable in all its parts: if he were only a treſpaſſer ab initio by relation of law for an exceſs of authority in the mode of executing a legal warrant; or a treſpaſſer in ſubſtance and in deed throughout every part of the tranſaction. Suppoſe we permit the proceedings to go on in the courſe they are at preſent, and the trial of the ſuit againſt *Colman* ſhould firſt take place; it being admitted on the record that ſuch a warrant was granted by the Houſe of Commons, its legality not being queſtioned, the right to enter the houſe not being queſtioned, and the only queſtion being whether it were done with ſuch military force and terror and outrage as the occaſion did not call for, or the warrant did nor require; if the queſtion were only on the exceſs, to be ſure the Court would direct very differently as to the meaſure of damages from what they would direct if it ſhould appear that the warrant of the Houſe of Commons afforded no protection, that the officer was wholly unexcuſed in all that he did, and that it

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was not only in legal contemplation a trefpafs ab initio, but fubftantially an injury in all its parts. Then fuppofing we were to direct the jury, that there was no excefs; and the plaintiff obtained a verdict only on the general iffue; he might come afterwards and move the Court to enter up judgment for him, notwithftanding the finding on the fpecial iffues: or fuppofing we were to direct the jury to find damages only for the excefs, and they found accordingly; he might come afterwards to the court on the argument of the demurrers, or on the confideration of the queftion upon the motion to enter up judgment for him on the general iffue; and if he could eftablifh that the fpecial pleas found for the defendant furnifhed no juftification, he would be entitled to a larger meafure of damages; and he muft himfelf apply for a new trial; or, if the fpecial pleas were found againft him, for a new inquiry upon the general iffue, in order to have that larger meafure of damages affeffed for him. So that quâcunque viâ datâ he muft come again to the court for fome fupplementary juftice, which will not be furnifhed to him on the replication charging the excefs. Now what is the inconvenience in the other mode, in letting the demurrers in the cafe of the Speaker be decided firft? The convenience to juftice is great; the path is made clear and certain; the Court having previoufly upon folemn argument heard and decided the law of the cafe, no uncertainty can be imported into any fubfequent part of the proceedings. If the Court upon the argument of the demurrers confidered that the Speaker's warrant was no juftification to the officer acting under it; then, upon the trial of the iffues now joined, the Court would inftruct the jury to give damages not only for the meafure of excefs proved, but knowing that it was a cafe in which the

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whole proceedings were to be confidered illegal in fubftance as well as in form, they would inftruct the jury to give a larger meafure of damages. It appears therefore that the plaintiff himfelf would really be advantaged, if he be in the right to the extent of that which he afferts by his demurrers, by our granting the rule prayed for; for inftead of that reduced meafure of damages which under this record, as it ftands, the plaintiff feeks to recover as for an excefs, he would receive a larger meafure: and he would be alfo advantaged by the faving of expence; for the decifion of the demurrers one way or the other would probably govern the further proceedings. It is clear however that it would be more convenient to the adminiftration of juftice to have the general queftion arifing upon the demurrers determined firft, which will give the Court a certain rule to go by in directing the jury upon the trial of the iffues; and the meafure of damages will then be given according to the determination whether it be an excefs, or whether it be a clear unvarnifhed abufe of authority, without any right whatever. On every ground therefore it appears to me that we ought to grant the rule prayed for.

GROSE J. The expediency and juftice of the application has been fo lucidly explained by my Lord Chief Juftice that I cannot entertain a doubt upon the fubject in any way of confidering the queftion. There being two queftions to be decided between the parties, one of law, and another of fact, it muft always be defirable that the queftion of law fhould be determined firft; becaufe where the action is brought for an alleged infringement of the law, unlefs it be perfectly afcertained that the law has been infringed, all the proceedings are involved in confu-

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ſion and uncertainty: but when the law is clear, the Judge knows his duty, and the jury know theirs. And it makes a great difference in the meaſure of damages, whether the perſon againſt whom they are to be aſſeſſed has been engaged in the proſecution of an object wholly and originally illegal in itſelf; or whether, in purſuing that which was in itſelf legal, he went a little beyond that which the law permitted, and ſo was guilty of an exceſs, which made the act illegal. On that ground alone it appears to me moſt material and convenient that it ſhould be firſt aſcertained, whether the full juſtification ſtated on the other record be good or not: and when that queſtion has been once determined, the jury will know much better what meaſure of damages to aſſeſs againſt a man who has been purſuing originally a legal or an illegal authority. In every way therefore of conſidering the application (and I cannot add to the reaſons my Lord Chief Juſtice has given) this rule ought to be made abſolute.

LE BLANC J. In this cauſe of *Burdett* v. *Colman*, the rule is to ſhew cauſe why the trial of the iſſues ſhould not be put off, not to any definite period, but as it has been ſtated, with a view to have the iſſues in law, which have been joined in another cauſe by the ſame plaintiff againſt a different defendant, firſt decided; upon which deciſion it is ſaid that the proper determination of the iſſues of fact in this cauſe will depend. It is admitted, and indeed it appears by the proceedings, that three actions are depending, ariſing out of the ſame tranſaction, againſt three different perſons who have taken different parts in the ſame tranſaction: againſt one for iſſuing the warrant; againſt another, for executing the warrant by the apprehenſion of the plaintiff; and againſt the third for receiv-

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ing into his cuſtody the plaintiff arreſted under that warrant. In one of theſe cauſes there are pleas inſiſting upon the original legality of the proceeding, upon which iſſues in law have been joined; and it is admitted on the part of the plaintiff that thoſe iſſues in law muſt and can only be determined by the Court. And whether the queſtion is to be determined on the demurrers to thoſe pleas, or upon the trial of the iſſues at bar, or afterwards on motion, in caſe a verdict ſhould be found for the plaintiff on the general iſſue, and for the defendant on the ſpecial pleas; ſtill it muſt be determined by the Court: and therefore the deciſion of the Court upon this motion, whatever it may be, will not alter in any reſpect the trial of the ſeveral iſſues joined upon this record, becauſe the queſtion of law muſt come at laſt to be decided by the Court. Then the queſtion is, whether it will not be more expedient for the adminiſtration of juſtice, both in reſpect to the Court and to the jury who are to adminiſter that juſtice, that the queſtion of law, as to the original legality of the proceedings, ſhould be firſt determined, in order to clear the way for the exerciſe of the functions of the jury in aſſeſſing the damages. In one of the cauſes, which is a branch of theſe proceedings, it is admitted that the trial which ſtood for *Tueſday* next muſt be put off. But the principal conſideration is, inaſmuch as it is admitted that a great queſtion of law upon the legality of the warrant muſt ariſe in the courſe of theſe proceedings, which muſt materially affect the queſtion of damages to be given by the jury upon this record; whether that queſtion of law ſhould not be firſt determined before the iſſues in fact are tried: and though the cauſes be different, yet for the ſake of adminiſtering juſtice in all of them in the moſt expedient method, it muſt be con-

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ſidered the ſame as if the queſtions aroſe on the ſame record: and if there were a demurrer to one plea and iſſue taken on another in the ſame cauſe, however the practice of the Court might enable a party, if he pleaſed, to bring the cauſe to trial on the matter of fact before he argued the demurrer; yet if the Court ſaw that the ends of juſtice would be better promoted by firſt determining the queſtion of law on the demurrer, they would poſtpone the trial of the iſſue. So here, where the Court ſees no poſſible inconvenience which can ariſe to either party by having the queſtion of law firſt determined; and where it has not even been ſuggeſted that any injuſtice can be done by that courſe; (for I liſtened with attention to hear whether any more advantage could be derived to the plaintiff from having the iſſue of fact tried before the determination of the iſſue in law, but have not heard of any:) and where it appears that inconvenience and certainly embarraſſment to thoſe who are to adminiſter juſtice muſt ariſe from leaving in doubt the law on the trial of the fact: for the direction to the jury muſt be different according as the law is found to be for or againſt the defendant, and probably it might be neceſſary to aſſeſs different damages according as in the event the original proceſs ſhall be decided to be legal or illegal: and as the determination of the court upon the preſent rule is not to vary the tribunal which is to determine the law; and it would be more convenient to the Court to decide the queſtion of law firſt which ariſes on the demurrers: it appears to me that this is a proper application, and that this Court will beſt diſtribute juſtice by poſtponing this trial.

BAYLEY J. I entirely agree with my Lord and my Brothers that the trial ſhould be poſtponed. I think it will be greatly for the benefit of the Court, greatly for the benefit of the jury, and even greatly for the benefit of both

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both the parties, that the general queſtion of law ſhould be firſt decided. Whoever reads this record muſt be of opinion that the damages would be different according to whether the Speaker's warrant be good in law or not: for if the plaintiff have to complain of the whole of the tranſaction as a treſpaſs, there would be greater damages neceſſary to be given than if it were merely an exceſs in the execution of a proceſs in itſelf legal. In the one caſe the plaintiff would have to recover damages for the impriſonment of his perſon during the whole period of time, as well as for the force and injury in making the arreſt: in the other only for the exceſs in the manner, when the damages ought to be leſs. Now unleſs the law be clearly aſcertained, before the Court are called upon to direct the jury, by what rule the damages are to be aſſeſſed, the Court will be embarraſſed, and the jury will be embarraſſed; and the damages aſſeſſed will be contingent. Are we to tell the jury to aſſeſs damages on the ſpecial pleas for the exceſs, and other damages on the general iſſue for the whole treſpaſs, provided the Court ſhall be of opinion ultimately, that the defendant is anſwerable for the whole? Unleſs that courſe were adopted, if the jury were directed to give damages for the exceſs only, and afterwards the Court, on hearing the argument on the demurrers, ſhould be of opinion that the warrant itſelf was illegal, an injury will be done to the plaintiff, unleſs he can come afterwards to the court and deſire them to correct their meaſure of damages; and the inquiry as to the exceſs will have been entirely uſeleſs, if the defendant were anſwerable for the whole treſpaſs. On the other hand, if the warrant be held to be legal, it will be uſeleſs to give damages for the whole treſpaſs. There is another point of view in which the preſent courſe will be injurious to the plaintiff. If

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at the trial he ſhould go for damages for the exceſs only, and ſhould obtain them; and the Court ſhould afterwards be of opinion that the pleas are bad; then in point of law it might be conſidered, that thoſe damages were given for the whole injury; and perhaps in the action brought by Sir *Francis Burdett* againſt Mr. *Abbot*, upon payment of the damages for the exceſs in Mr. *Colman*'s caſe, there would be a plea puis darrein continuance, that the damages for the ſame treſpaſs which had been committed had been recovered againſt and paid by *Colman*: the conſequence would be that the proceedings in the action in Mr. *Abbot*'s caſe would be interrupted. Upon the whole, there certainly would in the preſent courſe of proceeding be embarraſſment to the Court and to the jury, and diſadvantage to the party who was in the right. And with reſpect to the plaintiff himſelf, if he do ſuffer any inconvenience by the alteration now propoſed (and I do not ſee that he will certainly ſuffer by it) it is entirely his own fault; becauſe though he were not compelled to ſet his demurrers down for argument before, yet he had the full opportunity of doing ſo, and he ſtill has the opportunity of ſetting them down now: he has therefore no right to complain that the Court make an arrangement convenient to themſelves, and moſt convenient to the correct trial of the queſtion, and which has ultimately a tendency to advance his own intereſts.

Shepherd Serjt. then obſerved, that the form of the rule was to put off the trial generally: and on the *Attorney-General* anſwering that it was only to put it off until after the argument upon the demurrers in the cauſe againſt the Speaker; *Shepherd* Serjt. ſuggeſted a difficulty in wording the rule in that manner, in caſe the plaintiff ſhould here-

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after determine not to proceed in that caufe; which difficulty ought not to be interpofed. But

Lord ELLENBOROUGH C. J. faid, that the Court muft either put it off definitely or indefinitely: they could not put it off definitely, becaufe it depended upon thofe other proceedings and arguments which were to take place: and till they knew how thofe would happen in point of time, they could not put it off till a certain day; therefore they muft put it off generally. But as foon as the time was capable of being afcertained, the Court would put the plaintiff in the moft expeditious courfe of trial that the proceedings would allow of: they could have no wifh that the plaintiff fhould be delayed an hour, and they would not fuffer him to be delayed an hour beyond that which was rendered neceffary by the ftate of bufinefs.

The rule was therefore made abfolute to put off the trial of the caufe of *Burdett* v. *Colman* until after the argument of the demurrers in the caufe of *Burdett* againft *Abbot*: and the trial of the other caufe was put off generally.

The KING *against* The Inhabitants of ST. MARY-LE-BONE, in MIDDLESEX.

Wednesday, Nov. 14th

Coupling the ſtat. 35 *Geo.* 3. c. 101 (which enables two juſtices to ſuſpend orders of removal on account of the ſickneſs of the paupers, and to give the coſts of ſuch ſuſpenſions, with an appeal againſt ſuch coſts if they amount to 20*l*.) with the ſtat. 8 *W.* & *M.* c. 1. ſ. 9. (which gives an appeal to the party *grieved* by any determination of the juſtices reſpecting the ſettlements of paupers by the means there mentioned;) appeals lie againſt an order of removal which was ſuſpended and againſt a ſubſequent order for coſts; notwithſtanding the death of the pauper before any removal of him in fact made, and though the coſts were under 20*l*.; ſuch order for coſts attaching by conſequence a *grievance* on the pariſh to which the order of removal was made, if the pauper were not ſettled in it.

AN order was made by two juſtices, dated 3d *July* 1809, for the removal of *James Harlow* from *Hitchin* in *Hertfordſhire* to *St. Mary-le-bone* in *Middleſex*; the execution of which order was at the ſame time ſuſpended by reaſon of the ſickneſs of the pauper, purſuant to the ſtat. 35 *Geo.* 3. *c.* 101. By another order of the 18th of *Sept.* following, the ſame juſtices, reciting that the ſaid *James Harlow* was then dead of the ſickneſs under which he lately laboured, and that it had been proved on oath before them that the reaſonable charges incurred by the ſuſpenſion of the order of removal amounted to 5*l.* 2*s.* 8*d.*, directed thoſe charges to be paid on demand, in purſuance of the ſtatute, by the pariſh officers of *St. Mary-le-bone* to the pariſh officers of *Hitchin.* The pariſh of *St. Mary-le-bone* thereupon appealed to the ſeſſions as well againſt the order of removal as againſt the order for the payment of the charges: but the ſeſſions diſmiſſed both the appeals, and ſet forth the ſpecial matter in a caſe for the opinion of this court; in which caſe it was alſo ſtated that neither of the orders of removal or ſuſpenſion thereof were ſerved on the pariſh officers of *St. Mary-le-bone* until after the death of the pauper, which happened between the 3d and the 11th of *July* 1809: after which time the pariſh officers of *St. Mary-le-bone* were ſerved with the above-mentioned orders, and the 5*l.* 2*s.* 8*d.* was demanded of

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them: at which time they gave notice of appeal to the parish officers of *Hitchin* against the order of removal of the 3d of *July* 1809, "which said order was suspended on the day of the date thereof;" and also against the order of adjudication dated the 18th of *September* 1809, &c. for the payment of 5*l*. 2*s*. 8*d*. for the charges incurred by the the suspension of the said order of removal dated 11th of *Dec*. 1809. That the respondents offered no evidence that the pauper was settled in the parish of *St. Mary-le-bone;* but contended that no appeal could lie to the sessions against the said order of removal touching the settlement, inasmuch as the same had never been executed: and that there can be no execution of an order of removal but by delivering the pauper to the officers of the parish to which he is to be removed; until which time the parish to which he is to be sent is not aggrieved, and until aggrieved (under all the antecedent subsisting laws relating to the settlements of the poor, the orders for their removal, and appeals against these orders) no right or ground of appeal can arise, and of course the sessions can have no appellate jurisdiction. That the order for the payment of the 5*l*. 2*s*. 8*d*. the adjudged costs and charges after the suspension of the order of removal, was not served till after the death of the pauper: and as the sum is less than 20*l*., by stat. 35 of *Geo*. 3. *c*. 101. no appeal is given to the sessions, and that court has no authority to review, reduce, or make any alteration whatever in the sums so adjudged to be paid by the two justices. That the appellants contended that they were not ousted of their right to appeal, but that the respondents were bound to prove that the pauper was settled in the parish of *St. Mary-le-bone*, that order having been appealed against; and that the order for the payment of expences was not

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conclusive for the purpose of establishing the settlement of the pauper; as the effect of that order would be to oust the parish, to whom the pauper was removed, of their right of appeal, and to fix them with the payment of expences for a pauper who might not be legally settled with them; which was never intended by the statute.

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Trollope, in support of the orders of sessions, now contended that no appeal lay against the order of removal, because it had not in fact been executed; nor any appeal against the order for payment of costs, because the stat. 35 *G.* 3. *c.* 101. which alone gives any appeal against costs upon orders of removal, limits it to cases of 20*l.* and upwards. And such a provision cannot be deemed incidentally to have given a power of appeal against all orders of removal where costs to any amount have been ordered to be paid; for no appeal lies in any case unless it be expresly given by statute. The question then reverts to the meaning of the statutes 3 *W.* & *M.* *c.* 11. *s.* 9. and the 8 & 9 *W.* 3. *c.* 30. *s.* 6. the only provisions which relate to this matter. By the first of these, after providing that persons may gain settlements by serving annual parish offices, or paying parish rates, or by hiring and serving for a year, or by apprenticeship, without notice in writing delivered and published in the parish church; it is enacted that if any persons "shall find themselves *aggrieved* by any determination" of the justices in any of the above cases, they may appeal to the next general quarter sessions. Now under that statute it has always been considered that there is no *grievance* until the order is executed by the removal in fact of the pauper to the parish to be charged; and the time for making the appeal has been reckoned from the execution of the order. And this is confirmed by the general

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clause of the 8 & 9 *W.* 3. which enacts that "the appeal "against *any order for the removal* of any poor person from "out of any parish, &c. shall be had, prosecuted and "determined at the general quarter sessions, &c. for the "county, &c. wherein the parish, &c. from *whence such* "*poor person shall be removed* doth lie, and not else-"where."

Lord Ellenborough C. J. The appeal is by the first statute of *William* given to the party *aggrieved* by the determination of the justices respecting the settlement of the pauper: then though the grievance grow by a subsequent statute, the party is still aggrieved by the order of removal. Before the stat. 35 *Geo.* 3. there was no grievance to the parish to which the order of removal was made until it was executed; but that statute attaches a contingent consequence to the order itself in this case, which, coupled as it is with the order for payment of costs, makes it a *grievance*, though the pauper died before any removal in fact took place. Then the appeal against the order for costs is not against the quantum, but against the liability of the parish to pay any costs at all in this case, taking it as a consequence of the order of removal appealed against.

Per Curiam, Orders of Sessions, dismissing the appeals, quashed.

Espinasse and *Cabell* were to have opposed the orders.

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One who is de facto guardian of the poor of a parish united with other parishes under the stat. 22 *Geo.* 3. *c.* 83. for the better relief and employment of the poor, and who is received and acknowledged by the parish as guardian, though not legally appointed such under the statute, is yet competent to apply in that character to a justice of the peace to take the examination of a single woman with child, in order to filiate the bastard; which, by the stat. 6. *Geo.* 2 *c.* 31. *s.* 1., is directed to be made *upon application by the overseers of the poor*, in whose place such guardian is appointed: and he is also competent to apply to the justice for a summons against a reputed father for not obeying an order of bastardy; which, by stat. 49 *G.* 3. *c.* 68. *s.* 3. is directed to be made *upon complaint by any one of the overseers of the poor.* And though the latter statute direct the magistrate, upon such complaint and proof upon oath of the order for payment of maintenance, and non-payment thereof, *to issue his warrant to apprehend* the reputed father; yet it is proper for the justice to issue a *summons* in the first instance to the party charged, to attend and shew cause, &c.

THIS came on upon a rule on the defendants, justices of peace for the county of *Surrey*, to shew cause why a mandamus should not issue to them, to take the examination of *Martha Barnett* a pauper of the parish of *Dunsfold*, in that county, touching the reputed father of a bastard child, of which she was pregnant; and also commanding them to issue their summons directed to *W. Foster* of the same parish, to compel his appearance before them to answer for having disobeyed an order of bastardy made against him. The application was founded upon the affidavit of *F. Sadler*, stating that in 1787 *Dunsfold* and other parishes united to adopt the provisions of the stat. 22 *Geo.* 3. *c.* 83. for the better relief and employment of the poor; and that under that act he was duly appointed guardian of the poor for *Dunsfold* in 1794; and that from that time up to *Easter* 1810, at the several public meetings held in *Easter* week respectively for the appointment of parish officers in general, and also for the purposes of the said act, he from time to time entered into an agreement with the parishioners, duly qualified under the act for that purpose, to continue guardian of the poor; and that by virtue of such agreements he did continue to execute the duties of the office up to *Easter* 1810, when he was in like manner continued in office for the ensuing year. That at a meeting of justices on the 16th of *June* last, *Sadler*, as such guardian, attended with *Martha Barnett* to filiate the bastard child of which

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she was pregnant, and informed the defendants then present that he had agreed with the parish of *Dunsfold* to continue in the office of guardian for the year ensuing, and in that character required them to take her examination; but they refused to take cognizance of the matter. That he also applied to them at the same time, as such guardian, for a summons against *W. Foster* to appear before them, for neglecting to obey an order of bastardy; which they also refused to issue. That the justices required a list of the persons qualified to serve the office of guardian to be made out and laid before them; but that the parish persisted in their appointment of *Sadler*: notwithstanding which the defendants, without any such list made out or returned to them, on the 19th of *May* made an appointment in writing of *J. Pullock* of *Dunsford* to be guardian of the poor of that parish, though he refused to accept the office.

The defendants, in answer, stated that at the annual meeting of justices held for the appointment of parish officers on the 5th of *May* last, inter alia, for the purpose of appointing a guardian of the poor of *Dunsfold* under the provisions of the act; (the former appointment having, as they submitted, then ceased (*a*);) no list (*b*) of persons qualified to fill the office having been returned to them from the parish of *Dunsfold*, they adjourned to the 19th for the purpose of having the list returned; and no list being then returned, and considering *Sadler* to be an unfit person to be continued in the office, they appointed *J. Pullock*, a person duly qualified, to be guardian for that year.

(*a*) By *s.* 14. of 22 *Geo.* 3. *c.* 83. the office determines in *Easter* week.

(*b*) By *s.* 3. of the act two-thirds in number and value of the owners and occupiers of lands, &c. (vide 33 *G.* 3. *c.* 35.) qualified as the act directs, may recommend to the justices three proper persons qualified for guardians of the poor of the parish; and by *s.* 7. two justices of the peace shall appoint one of the persons so recommended to them to be guardian, &c.

year. That they believed that the pariſhioners, ſtated as having concurred in the agreement to continue *Sadler* guardian of the poor for the year enſuing, were not two-thirds in number and value of the pariſhioners according to the poor's rate, as required by the act; and therefore conſidering *Sadler* not to have been legally continued or appointed guardian of the poor at the time, and that they could not regularly inveſtigate any complaint of the kind not preferred by a regular pariſh officer, they refuſed to take the examination of *Martha Barnett* for filiating her baſtard, or to iſſue the ſummons to *Foſter* for diſobeying the order of baſtardy.

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Nolan and *Caſberd* ſhewed cauſe againſt the rule, and contended that by the ſtat. 6 *Geo.* 2. *c.* 31. *ſ.* 1. applications to juſtices, in caſes of baſtardy, for orders of filiation on examination of the woman, or for enforcing ſuch orders, muſt be made *upon application by the overſeers of the poor, &c.*, in whoſe place, ſo far as regards the management of the poor, the guardian is appointed by the ſtat. 22 *G.* 3. *c.* 83. and 33 *G.* 3. *c.* 35. This was expreſsly decided in *The King* v. *Nottingham* (*a*), and by *Foſter* J. in *Rex*

(*a*) *E.* 10 *G.* 2. 1 *Conſt's Bott*, tit. *Baſtards*, ſect. 5. The following is a fuller note of that caſe from Mr. *Ford*'s MS.

The KING *againſt* The Inhabitants of ST. MARY'S, NOTTINGHAM.—This was an order of baſtardy, made by the Seſſions of *Nottingham*. And *Makepeace* took many exceptions to it; but the only ones on

An order of Seſſions, awarding ſuch coſts as other perſons ſhould adjudge to be reaſonable, is bad.

The ſtat. 18 *Eliz. c* 3. *ſ.* 2. concerning "baſtards left to be kept at the charges of the "pariſh where they are born," enacting, "That two juſtices of the peace in or next "unto the limits where the pariſh church is, within which pariſh ſuch baſtard ſhall be "born, upon examination, &c. ſhall take order as well for the puniſhment of the mother "and reputed father, as alſo *for the better relief of every ſuch pariſh*," &c.; held that an order of baſtardy, not appearing to be made on complaint of the pariſh where the child was born, but on the contrary ſtating that ſhe was a caſual poor there, is bad: for non conſtat but that ſhe may have been born in a pariſh in another county out of the juriſdiction of the juſtices making the order.

But there is no objection to the baſtard, being of years of diſcretion giving evidence on oath as to her reputed father; nor to the reputed father being examined, if he chuſe to admit the fact; though he be not compellable to anſwer.

An order of baſtardy is only binding on the reputed father to indemnify the pariſh in which the baſtard is born, till the baſtard has acquired another ſettlement for herſelf elſewhere.

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Rex v. *Fox* (a). [*The Court* observed, that the distinction was not taken in those cases between the complaint of an officer de facto and of one de jure; and that if *Sadler* the guardian

(a) *T.* 29 & 30 *G.* 2. cited by Lord *Kenyon* C. J. from his own manuscript, 6 *Term Rep.* 148—151. *Blackerby's Just.* 44. S. P. But an order of bastardy made upon the stat. 18 *Eliz.* c. 3. before the passing of the 6 *Geo.* 2. c. 31. *s.* 1. appears by the report of *Rex* v. *Buckall*, *M.* 3 *Geo.* 2. in 1 *Barnard* 261. *K. B.* to have been holden good, though not made upon the complaint of the parish officers.

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which the Court relied, and which they held to be fatal, were these following; 1st, That the Sessions had given the parish so much for charges and expences as should be adjudged to be reasonable by *A. B.* and *C. D.*, who were two attornies. And this exception Mr. *Abney*, who was counsel for the parish, held to be fatal, as well as the Judges; because it has often been held that the Sessions cannot delegate their authorities.

2d, The order sets forth that this bastard was examined upon oath. As though it did not appear by the order how old she was; (for in fact she was 35 years old;) yet it appeared she was old enough to be sworn, and, consequently, might have gained a settlement for herself; and, therefore, the justices should have adjudged that this was the place of her last legal settlement; which they have not done.

3d, It appears that the bastard herself was sworn and examined as to the fact of her being the daughter of this reputed father; which, for the absurdity of it, ought not to be allowed; and likewise the reputed father himself was examined, which he ought not to have been.

4th, This complaint does not appear to have been made by the parish where the child was born; but the contrary rather appears; for it is stated she was a casual poor; and by the stat. 18 *Eliz* c. 3. no parish but that where the child was born has a power given of complaining; and she may have been born in a parish that lies in another county, and then these justices could not have any power to make this order. To these three last exceptions the Court gave their opinion as follows:

Page J. thought the 2d exception was fatal for the reasons above; but was of opinion there was nothing in the 3d exception, because it appears there was another evidence examined besides the bastard; which was enough to support the order. And though it would be ridiculous to examine the bastard as to the certainty of her father, yet she might properly enough be examined as to some circumstances relating to it; as whether the man, when accused with it, had acknowledged her to be his daughter, and whether she were constantly reputed to be his daughter; and such like. And though the justices could not compel the reputed father to give testimony in this case, yet there is no fault in admitting him to do it, and he might have confessed the fact. And he thought the fourth exception fatal for the reasons above.

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guardian de facto acting for the parish in that character could not make the complaint, there was no other officer who could have made it.] In other cases it has been held that the acts of a parish officer not duly appointed were invalid: and though the contrary was supposed to have been held in *The King* v. *Wymondham* (a), and that a parish certificate signed by a majority of the parish officers de facto would bind them; yet that was explained by *Lawrence* J. in *Rex* v. *Clifton* (b), who considered that the conclusion to be drawn from what Lord *Kenyon* said in the former case was, that if it had appeared that the officers who signed the certificate were not a majority of the whole number of officers de jure, it would have been bad. [They then undertook to shew from the affidavits that *Sadler* was not a legally constituted guardian under the statute: but the Court did not think it necessary to go into the affidavits on that point.] As to the summons to

(a) 6 *Term Rep.* 552.
(b) 2 *East*, 175. and *Rex* v. *The Inhabitants of All Saints* in *Derby*, *post*.

PROBYN J. agreed with *Page* in the whole; and said, if a bastard gain a settlement in a different parish from that in which it was born, that parish shall maintain it; and the security given by the reputed father to indemnify the parish extends only to the cases where the child has not gained another settlement for itself elsewhere.

LEE J. agreed with the others. Whereupon, *per Curiam*, the order was quashed.

Recognizance of the reputed father taken to appear at the next sessions.

And then *Makepeace* prayed that the man might not be bound in a recognizance to appear at the next Sessions held in the county of *Nottingham*: for this is usually done: yet this differed from common cases where orders are quashed for mere insufficiency of law: for that in this case it does not appear that the justices of the peace for that county have any jurisdiction over this man at all; because it does not appear that the bastard was born within a parish within that county, but rather the contrary, by calling her *a casual poor*.

But, *per Curiam*, It is the course always to take such recognizance of the reputed father upon quashing an order of bastardy here: and if the justices there have no power over him, it is not to be supposed that they will proceed against him.

Foster,

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Foster, they took an objection upon the late stat. 49 *G.* 3. *c.* 68. *s.* 3. which, after reciting "that parishes are often "put to great expence in enforcing the performance of "orders of maintenance made on the filiation of bastard "children," enacts, "that if any reputed father, &c., on whom any order of filiation or maintenance shall have been made, shall neglect or refuse to pay any sum of money which he shall have been ordered to pay for the relief of any such bastard child by any order, &c. it shall be lawful for any justice of the peace, and he is thereby required, *upon complaint made to him by any one of the overseers of the poor* of any parish, &c. liable to the maintenance of such bastard, or where such bastard shall then be, and upon proof on oath of the order for payment of such sum, and of such sum being unpaid, and of a demand and refusal, &c., *to issue* (*a*) *his warrant to apprehend* such reputed father and to bring him before such justice to answer such complaint: and if he do not pay what is due, or shew reasonable and sufficient cause to the justice for not doing so, the justice is required to commit him to the house of correction or common gaol for 3 months, &c. And this provision they contended was mandatory on the justice to issue his warrant to apprehend in the first instance, and not a summons only, which was applied for in this case.

Abbot and *Gleed*, contrà, were stopped by the Court.

(*a*) Note the different wording of this from the 2d section of the act, where, upon the mother's examination on oath, in the first instance, charging the reputed father, the words are, "it shall be lawful to "and for such justice, upon application, &c. to issue out his war-"rant for the *immediate* apprehending of such person so charged as afore-"said, and for bringing him before such justice." This might be meant to provide against the probability of the party's absconding to avoid having an order made upon him.

Lord

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Lord ELLENBOROUGH C. J. The perſon making the application to the magiſtrates, being guardian of the poor of *Dunsfold* de facto, acting in that character, and recognized as ſuch by the pariſh, and no objection being made by the general overſeers of the poor to this perſon making the complaint to the magiſtrates, as againſt one who uſurped their authority, we do not think that the magiſtrates could enter upon ſuch an occaſion into the objection that he was not duly appointed guardian. As to the caſes referred to touching certificates, requiring them to be ſigned by the full number of officers de jure competent to bind the pariſh, they are very different. Where the pariſh is to be bound thereafter by the acts of its officers, it muſt be ſhewn that they had a competent authority: but here *Sadler* did no act aſſuming to bind the pariſh, but only applied to the magiſtrates to take the examination of the woman, and put the matter in a courſe of inquiry. Then as to the objection upon the late act, it is the general duty of magiſtrates, in caſes of this ſort, where the complaint is merely for non-payment of money, to iſſue a ſummons in the firſt inſtance before they grant a warrant of apprehenſion, and it requires very ſtrong words to take away the neceſſity of the ſummons. I remember a caſe ſome years ago where though the words of an act authorizing the magiſtrate to iſſue his warrant for a purpoſe of this kind were very general, yet the Court held it to be the duty of the magiſtrate to iſſue his ſummons in the firſt inſtance. And I cannot think that the words here uſed are ſufficiently ſtrong to take away the power of iſſuing his ſummons.

BAYLEY J. The uſe of the ſummons is to give the party an opportunity of ſhewing, if he can, that he has paid

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paid the money and obeyed the order, and fo to fhew that there is no ground for the complaint to authorife his apprehenfion.

Per Curiam, Rule abfolute.

Thurfday, *Nov.* 15th.

REGULA GENERALIS.

As to bail exceeding 1000*l.*

IT IS ORDERED, That from henceforth in bailable caufes for any fum exceeding 1000*l.*, it fhall be fufficient for the bail above to juftify in 1000*l.* beyond the fum fworn to.

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Tuesday, Nov. 20th.

The plaintiff declared in covenant, and set out first an indenture, whereby the defendant, the original proprietor of a medicine, bargained, sold, and assigned all his right, interest, and property in it to a third person, subject to a covenant by the assignee to pay him one-third of the profits during his and his wife's lives; and also covenanted with the assignee *that he would not thereafter, by himself or jointly with any other, prepare or sell, or engage with any other person in preparing or selling the said medicine, &c.*: and then the plaintiff set out a second indenture, whereby the first assignee assigned all his right, interest, and property in the medicine to the plaintiff, subject to the covenant of reservation: and then the plaintiff set out a *third indenture between him and the defendant*, reciting the two former, and *that he had agreed with the defendant for the absolute purchase of all his right, share, and interest, as well in the said medicine, as in the one-third share so reserved to the defendant*; by which indenture the defendant bargained, sold, and assigned to the plaintiff all *that third share, and all other* share, or proportions, *right, title, interest*, claim, or demand whatsoever of the defendant *to the said medicine*, or to the profits, &c. *habendum* to the plaintiff in like manner as the defendant might have done if those presents had not been made: with a covenant that the plaintiff might at all times thereafter *prepare and sell the medicine in the name of the defendant, and receive the profits thereof to his own use*; and another covenant for *further assurance*, for the more perfect and absolute assigning and assuring to the plaintiff *the said medicine and all the profits arising from the sale thereof.* And then the plaintiff proceeded to assign breaches *in the words of the first indenture between the defendant and the first assignee*; that the defendant prepared and sold the medicine, and also engaged with others in preparing and selling it for his own profit, &c.: and charged some of these breaches to be *contrary to the first indenture, and to the defendant's covenants therein with the first assignee*; but the second breach was charged to be *contrary to the last indenture and to his covenant with the plaintiff.*

Held that the last indenture alone (without the confirmation, which, however, the construction of it received from the two former, recited therein,) shewed an intention in the defendant, and the words of it were large enough, to assign to the plaintiff not only the *one-third* share of the profits reserved by the first indenture, but *all* the defendant's right, title, and interest in the medicine, and all the future profits arising from the sale thereof; and that such assignment of all his interest and property in the medicine raised an *implied covenant* that he would not prepare or sell the medicine, or engage with others in so doing, for his own profit; such preparation and sale being a retention and exercise of the right of preparing and vending the medicine of which he was once the proprietor, in derogation of his deed, whereby he had conveyed such right to the plaintiff. And held that the second breach was well assigned, which was charged to be *against his covenant in the last deed with the plaintiff.*

IN covenant the plaintiff declared, that whereas on the 28th of *May* 1801 an indenture under seal was made between the defendant and one *J. B. Farkas*, reciting articles of agreement dated 19th of *June* 1800, and that the defendant was become the sole proprietor of a medicine called *Pastilles Martialles de Montpellier*, or *Aromatic Lozenges of Steel*, and of the recipe for making the same, and was also entitled to the copyright of a treatise written and published by him concerning the said medicine, entitled, &c.; and reciting also that *Farkas* had contracted with the defendant for the purchase of the recipe and all his future interest in the same, together with the stock of lozenges then unsold, and also the copy-right of the trea-

 tise,

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tiſe, and all the defendant's right and intereſt in the articles of the 19th of *June* 1800, at the prices and ſubject to the covenants therein contained; it was witneſſed that in purſuance of the agreement, and in conſideration of 500*l.* paid to the defendant by *Farkas*, the defendant bargained, ſold, and aſſigned, transferred, and ſet over to *Farkas* the ſaid recipe, art, or myſtery of preparing the ſaid medicine, and alſo the copy-right of the ſaid treatiſe, and all the right, and intereſt, benefit, property, claim, and demand whatſoever of the defendant in and to the ſaid lozenges and treatiſe, and alſo all the defendant's intereſt under the ſaid articles of agreement, together with the articles themſelves, ſubject to the covenants and agreements therein contained on the part of the defendant, and the profits ariſing from the ſale of the lozenges and treatiſe, and all the copies then unſold, and the ſtock of lozenges on hand; *habendum* the ſaid recipe, art or myſtery, and the ſaid treatiſe, and the intereſt of the defendant in the ſaid articles, and at all times thereafter to demand, receive, and take the whole profits and intereſt thereof unto *Farkas* and his aſſigns, in like manner, and as amply as the defendant could have prepared and ſold, received and taken the ſame, had thoſe preſents never been executed. And the defendant thereby covenanted to *Farkas* that he (the defendant) was ſolely poſſeſſed of and entitled to the ſaid recipe and copyright, and that the written paper then delivered to *Farkas* was the true recipe for preparing the ſaid medicine, and that the defendant had not diſcovered nor would diſcloſe the art of making the ſaid lozenges or their ingredients to any perſon; and *that the defendant would not at any time thereafter either by himſelf, or jointly with any other perſon or perſons, prepare, utter, or ſell, or cauſe or procure to be prepared, &c.,* or

or engage or be concerned with any other person or persons in 1810.
preparing, or selling the said lozenges, or any quantity thereof,
to any other person or persons in Great Britain, Ireland, *or* SEDDON *against* SENATE.
elsewhere, for the profit or advantage of the defendant, his
executors, &c., for any rate or price, or upon any terms or
conditions whatsoever, or be in any manner directly or indirectly concerned in making or vending any medicine whatever
of a similar efficacy or quality, so as in any manner to injure
the sale of the said lozenges or medicine, or the said J. B. Farkas, *his executors, &c. or assigns, in the produce thereof,*
under the penalty of 5000*l*. And the defendant thereby authorized *Farkas*, his executors, &c. to sign the defendant's name to all labels which should be necessary to be affixed to the said lozenges, as a mark of their authenticity. And by the same indenture *Farkas covenanted to pay* to the defendant, his executors, &c. during the lives of the defendant and his wife, and the survivor of them, *a yearly sum equal to* 1-3*d of the profits* arising by sale of the said medicine. That by another indenture under seal, *2d Indenture of 12th of Jan. 1805.*
of the 12th of *January* 1805, between the said *J. B. Farkas* and the plaintiff, reciting the indenture of the 28th of *May* 1801, and that the plaintiff had agreed with *Farkas* for the absolute purchase of his future interest under it; *Farkas*, for the considerations therein mentioned, bargained, sold, assigned, transferred, and set over to the plaintiff the said recipe, &c. and copy-right, and all his right and interest, benefit, property, claim and demand whatsoever, both in law and equity, of and in the said recipe, &c. and copy-right, and all his interest under and by virtue of the indenture of the 28th of *May* 1801, or the said articles of agreement, to hold the premises and the whole produce and profits thereof unto the plaintiff, in like manner to all intents and purposes as he (*Farkas*)

 might

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3d Indenture, of 2d July 1805.

might have prepared, sold, received, and taken the same, had those presents never been made; and subject to the covenant in the indenture of *May* 1801, and particularly to the payment of the one-third share of the profits thereby reserved to the defendant, &c. That by another indenture under seal, made the 2d of *July* 1805, between the plaintiff and the defendant, reciting the former indentures of assignment and articles of agreement; and reciting that the plaintiff had agreed with the defendant *for the absolute purchase of all the right, share, and interest of the defendant as well of, in, and to the said medicine, as of, in, and to the said third part or share, or other part or share* of all the said profits arising by sale of the said medicine so reserved and made payable to the defendant, his executors, &c. during the lives of him and his wife, and the survivor of them, under the said indenture of assignment, or otherwise howsoever; as well such share of the said profits as had been already received by the plaintiff, as of all future profits that should arise from the said medicine, for 300*l.*: it was witnessed that for the considerations therein mentioned the defendant bargained, sold, assigned, transferred, and set over to the plaintiff *all that 1-3d part or share, and all other part, or share, or proportions, right, title, interest, claim, or demand whatsoever of the defendant to the said medicine; or in or to the profits that had arisen or been received, or that should arise by the sale of the said medicine, under the indenture of the 28th of* May 1801, *or of the articles of agreement of the 19th of* June 1800, *or otherwise howsoever;* to hold to the plaintiff *in like manner as the defendant might have done if these presents had not been made.* And it was further witnessed that for the consideration aforesaid the defendant released and discharged the plaintiff from all sums which the defendant, his exe-

cutors,

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cutors, &c. should be entitled to receive from the plaintiff on account of the profits arising from the sale of the said medicine, and from all covenants and agreements contained in the indenture of the 28th of *May* 1801, or in the articles of agreement of the 19th of *June* 1800. And the defendant also covenanted to the plaintiff, *that he had good right and full power to sell the said part or share* of him (the defendant) in or to the said medicine, and the profits arising from the sale thereof, for the use and benefit of the plaintiff; and that it should be lawful for the plaintiff, *from time to time and at all times thereafter, to prepare, compound, or make the said lozenges or medicines, and to sell the same in the name of the defendant, and to receive the profits arising from the sale thereof for his* (the plaintiff's) *sole use and benefit*. The defendant also covenanted that he, his executors, &c. should and would, from time to time and at all times thereafter, upon the reasonable request and at the charge of the plaintiff, his executors, &c. make, do, and execute all such further acts, deeds, matters, and things whatsoever, *for the further, better, more perfectly and absolutely assigning and assuring to the plaintiff the said medicine and copyright, and all the profits arising from the sale thereof* respectively, and all other the premises thereby assigned or intended so to be, as by the plaintiff, his executors, &c. should be reasonably devised, or advised and requested. The plaintiff then assigned the following breaches; 1st, that after making the several indentures, viz. on 1st of *June* 1809, and at other times, the defendant prepared, uttered, and sold divers of the said lozenges, and was engaged with other persons in preparing and selling divers quantities of the said lozenges, for his own profit and advantage, contrary to the force, form, and effect of the said indenture of the 28th of *May* 1801,

Covenant for further assurance.

Breaches.

and

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and of his covenants with *Farkas* and his assigns as aforesaid. 2d, That the defendant prepared, uttered, and sold divers of the said lozenges, and was also engaged with other persons in preparing and selling divers quantities of the said lozenges, for his own profit and advantage, contrary to the indenture of the 2d of *July* 1805, and to his said covenant with the plaintiff. 3d, That the defendant printed and published for his own benefit and profit a new edition of the treatise; contrary to the indenture of the 28th of *May* 1801, and to his covenant therein made as aforesaid. 4th, That the defendant was concerned in making and vending a certain medicine of a similar efficacy and quality, so as greatly to injure the sale of the said lozenges and medicine, and thereby injured the sale of the said lozenges or medicine by the plaintiff; contrary to the indenture of the 28th of *May* 1801, and the defendant's covenant therein made as aforesaid. And so concluded to the plaintiff's damage of 5000*l.* To this declaration the defendant demurred generally.

Richardson, in support of the demurrer, as to the first breach, objected that there was no privity of contract between these parties: the breach complained of is of a covenant made by the defendant, not with the plaintiff, but with *Farkas:* and it is a mere personal covenant, in which the plaintiff, as assignee, can acquire no privity, and which he cannot enforce by action in a court of law. It is an attempt to make a personal covenant run with a chattel or chose in action, in like manner as covenants touching the realty are sometimes held to run with the land and to bind the assignee. The only question can be, whether the last indenture of agreement, of the 2d of *July* 1805, between these parties, can so far embody and adopt the

 former

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former covenants between the defendant and *Farkas*, as to sustain the breaches thereof alleged by the plaintiff in this action against the defendant: but the covenants are altogether distinct: the last indenture only relates to the one-third share thereby conveyed; and the breaches (except the 2d) are all assigned upon the covenants with *Farkas*. The object of the last indenture was merely to buy up and redeem the annuities payable out of the proceeds of the medicine to the defendant and his wife. [*Bayley* J. observed, that the covenant for further assurance had a larger scope than that, and indicated a more general intent.] The indenture however only *assigns the one-third share, &c.*; that which had been before reserved to the defendant: and that appears more plainly by the habendum. But supposing that by this assignment a good interest in the subject matter were conveyed to the plaintiff, the purchaser, and he thereby acquired a property in it, the law would give him the ordinary remedies against a wrong-doer who invaded that property, without the necessity of transferring by implication the covenants between the defendant and *Farkas* into the indenture of *July* 1805 between the present parties. It is not every wrongful act upon the subject matter of a covenant which will enable even the covenantee to sue upon the covenant; but it must be something which goes in derogation of the whole right of enjoyment. As where one covenants for quiet enjoyment; if he himself enter and oust the grantor; that is an express breach of his covenant: but if he only commit a mere casual trespass upon the land, the law leaves the grantee to protect his property by the ordinary remedy of trespass. So if a ship were sold by bill of sale under seal, and afterwards the vendor commit any act of trespass upon the ship, or if he even took wrongful

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possession of it, the law would not raise an implied covenant by the vendor out of the contract of sale for the quiet enjoyment of the vendee, in order to afford him redress; because the ordinary remedies of trespass and trover would be sufficient to protect his property. As to the second breach, which alone is assigned upon the defendant's covenant with the plaintiff in the indenture of *July* 1805; he objected that there was no covenant set out in the declaration from that indenture to which that breach could be referred. The two covenants set out from it are, first, a covenant of title in the defendant, and of permission to the plaintiff to use the defendant's name in making, &c. the medicines for his sole profit, and next a covenant for further assurance; but there is no covenant that the defendant shall not sell, &c. the medicines; on which that breach is founded.

Taddy, for the plaintiff, said that he did not mean to contend that covenants might be annexed to and run with a personal chattel, the same as with the realty; but looking to the indenture of *July* 1805 between these parties, it was manifestly their intent that the defendant should no longer have any share of this medicine as he had before; but that he was to convey and assure his whole right and interest therein to the plaintiff: and that intent, if it can be collected from the words, must govern; and where the words are ambiguous, they must be taken most strongly against the covenantor. The situation of the parties, as it appears upon this record, at the time when the deed of *July* 1805 was executed, serves to explain their intent in that deed. The defendant having been originally the owner of a certain medicine, with the secret of preparing, and the sole power

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of vending it, by the firſt deed of *May* 1801, transferred all his right, intereſt, and property in the excluſive preparation and ſale of it, to *Farkas*, reſerving one third of the yearly profits. By the ſecond deed of *January* 1805, *Farkas* aſſigned all his right, intereſt, and property in the medicine to the plaintiff. Then, by the third deed, which recites the two former deeds, and that the plaintiff had agreed with the defendant *for the abſolute purchaſe of all* the defendant's right, ſhare, and intereſt, *as well of, in, and to the ſaid medicine*, as *of, in, and to the ſaid third part*, *&c.*; the defendant bargains, ſells, and aſſigns all that 1-3d part, *and all other* part or ſhare, or proportions, *right, title, intereſt, claim, or demand whatſoever of the defendant, to the ſaid medicine*, *&c.*; and of the profits, &c., under the indenture of the 28th of *May* 1801, *or otherwiſe howſoever.* And then there is a covenant that it ſhould be lawful for the plaintiff *at all times hereafter to prepare the ſaid medicines, and to ſell the ſame in the name of the defendant, and receive the profits to the plaintiff's ſole uſe.* Theſe words, and the whole ſcope of the laſt deed, ſhew a manifeſt intention in the defendant to bind himſelf to the plaintiff by the words of the firſt covenant; and therefore his preparing and ſelling the lozenges for his own profit, contrary to his expreſs covenant made with *Farkas* in the indenture of *May* 1801, is a breach in ſubſtance and effect, though not in expreſs words of his covenant with the plaintiff in the deed of *July* 1805. In *Browning* v. *Wright* (*a*), Lord *Eldon*, referring to the caſe of *Johnſon* v. *Proctor* (*b*), ſaid that it proceeded on the principle that the covenant was to be conſtrued according to the intention of the parties.

(*a*) 2 *Boſ.* & *Pull* 25. (*b*) *Yelv.* 175. and 2 *Brownl.* 212.

 "That

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"That the grantor having stated in the *recitals* that he was interested in the whole of the premises, when in fact he was interested in a moity only, the Court would not permit him to contend that a covenant for quiet enjoyment, *notwithstanding any act done by him*, was satisfied by a compliance with the mere words of that covenant, in a case where the grantee had suffered eviction, not in consequence of any act done by the grantor, but in consequence of the badness of his title. The recital itself amounted to a warranty." He also referred to 2 *Roll Abr.* 247. *l.* 50., and *Cossens* v. *Cossens*, *Willes*, 25. as instances of construction of words in the condition of a bond according to the intent of the parties, beyond the mere force of the words themselves: and then observed, that the word dedi (*a*) had been held to be a warranty in the case of a freehold or inheritance; and that concessi (*b*) raises an implied covenant in the case of a chattel interest. [Lord *Ellenborough* C. J. observed that the argument of the defendant's counsel went further; that the defendant having conveyed all interest in the subject-matter out of himself, the plaintiff had no remedy on the covenant, but only the same remedy as against any wrong-doer. That if one sold and covenanted to another an estate with the common covenants, and afterwards went on it to sport, the purchaser could not maintain covenant.] That would be no assertion of right and title in the vendor, but a mere wrongful act: but here the act done is an assertion of right and title, as much as the nature of the thing will admit of. It would be nugatory to suppose that the defendant meant to protect the plaintiff against the acts of other persons who did not know the secret of the medicine, and not against himself who was

(*a*) *Noles'* case, 4 *Rep.* 80. *b.* (*b*) Vide *Spencer's* case, 5 *Rep.* 18.

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was privy to it. By the last deed the defendant gives the privilege in terms of using his name to the plaintiff for this purpose, and by that covenant precludes himself from using his own name for the same purpose. Then he adverted to the third breach, for printing and publishing the treatise, the copy-right of which was assigned: and urged that by the stat. 8 *Ann.* c. 19. which vests the property of books in the authors for 14 years and enables them to assign, the covenant would run with the assignment. [But *Bayley* J. observed that the exclusive right of publication was limited by that act to 14 years; and it did not appear that the period was not expired; therefore the case could not be brought within that statute.]

Richardson, in reply, maintained that the recital of the deed of *July* 1805 did not support the argument as to the further intent of the defendant to assign and assure to the plaintiff the whole of the medicine beyond the one-third of the profits which remained in him to convey, and which alone the words of assignment and of the habendum purported to convey; and therefore the cases cited did not apply. Even a covenant for quiet enjoyment, he contended, would not go the length of the plaintiff's argument; for that would only defend the covenantee against entries or assertions of title: and the implied covenants arising out of the words *dedi* et *concessi* could not go further: they would bind the party as to what he had to grant, but would not bind him against future wrongful acts. [Lord *Ellenborough* C. J. wished that the cases upon the extent and meaning of those words had been further investigated, for the purpose of seeing whether they did not extend to protect not only the present title but the future enjoyment of the grantee

from

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from the wrongful acts of the grantor (a).] Even if the cases go that length, still the breach must be founded upon an assertion of title; otherwise the party trespassing is no more than a mere wrong-doer, against whom the other has his ordinary remedy. [*Taddy* observed that the first breach charged not only that the defendant himself prepared and sold the medicines, but engaged with others in doing so for his own profit; which was more than a casual wrongful act. The Court said they were aware of that; and the same was alleged in other breaches.]

Lord Ellenborough C. J. The same sense is to be put upon the words of a contract in an instrument under seal, as would be put upon the same words in any instrument not under seal; for the same intention must be collected from the same words of a contract in writing, whether with or without a seal. Now here the proprietor of a medicine having before conveyed all his right and interest, in the making and vending it, to another; reserving to himself one-third of the profits for the lives of himself and his wife, and the survivor of them; which other person had assigned all his interest in it to the plaintiff; by a subsequent deed not only releases his interest in the remaining third part, but bargains, sells, and assigns to the plaintiff that third part, "and all other part "or share, or proportions, right, title, interest, claim, or "demand whatsoever of him, the defendant, to the said "medicine, &c." Then having sold and assigned the medicine, by words competent to convey the whole property in it, as he has done by this deed, when he is afterwards concerned with others in the making and vending,

(a) Vide Co. Lit. 384. which collects many of the authorities on the subject.

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ing, on his own account, of the fame medicine, is not that a manifeft breach of his covenant? How can he be faid to have conveyed all his right, title, and intereft in the fubject-matter, if he retain the making and vending and the profits arifing from the fale of any part of it? It is in manifeft contravention of his contract for the fale of the whole. I do not think therefore that we need look any further into the cafes which have been adverted to. In moft of them I prefume that the covenants would be found to apply to real property, and to turn upon particular words, which may not fo aptly apply to this cafe: but here it is fufficient to fay that the defendant's making and felling and retaining for his own benefit the profits of that in which he purported to convey all his right, title, and intereft to the plaintiff, is againft the true meaning and effect of his covenant. When I firft looked at the cafe, I own my opinion leaned the other way; but on further confideration I think the plaintiff is entitled to judgment on the ground I have ftated.

GROSE J. There appears in the deed a manifeft intention of the one party to fell the whole of his intereft in the making and vending of this medicine, and of the other to purchafe the whole intereft in it. When therefore the defendant bargains, fells, and affigns to the plaintiff all his third part, and all other part, &c., right, title, intereft, claim, or demand whatfoever in the paft or future profits of the medicine, under the indenture of *May* 1801, &c., or otherwife howfoever; what elfe could he have meant but that the vendee fhould have the fole property and vending of the medicine? It amounts to a covenant that the whole of the thing bargained and fold

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SIDDON *against* SANATS.

should be the exclusive property of the vendee: the breach therefore of that covenant is well assigned.

Le Blanc J. The question arises upon the last deed; and though there had been no other deed than that, I should have thought that the words of it which have been referred to would have amounted to an implied covenant on the part of the defendant to convey to the plaintiff the sole vending and profits of the medicine: but the argument is very strongly fortified by the reference to the former deeds, in the first of which the defendant had used the strongest terms of conveyance as to the future right of making and vending of the medicine. The last deed recites the two former, by the first of which it appears that the defendant had parted with all his future interest and property in making and vending the medicine to one *Farkas*, who thereby covenanted to pay the defendant, during the lives of him and his wife, and the survivor, one third of the profits: and by the second deed it appears that *Farkas* had assigned all his interest and property in the medicine under the first deed to the plaintiff; subject to the yearly payments of one third of the profits to the defendant and his wife and then the third deed proceeds further to recite "that the "plaintiff had agreed with the defendant for the abso-"lute purchase of *all the right, share, and interest of the* "*defendant*," not only in the one third of the profits reserved to him by the first deed, but "as well *of, in, and* "*to the said medicine*, as *of, in, and to the said third* "*part*, &c. So much for the recital. And then the defendant proceeds to convey to the plaintiff, not only his one third part, but "all other part, &c., right, title, in-"terest, claim, or demand whatsoever to the said medi-

"cine,

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"cine, &c." And that brings it to the question, whether, when it appears that the defendant had agreed to part with his whole interest in the medicines, and he does convey in terms large enough to cover his whole interest, the law will not imply a covenant that he shall not himself vend that for his own profit which he had agreed to sell and had sold to another? And it appears to me that the breach assigned against him in that respect is not like a mere tort committed by a stranger; but is a breach of that right which he had conveyed to another. He has done that which is the exercise of an assumed right over a subject matter which he had before covenanted to convey and had conveyed to the plaintiff: and I also think that the manner in which that breach is assigned is not merely as in the case of a tort by a stranger, but as of a right conveyed to the plaintiff by the deed of the defendant.

Bayley J. The Court do not say that all the breaches assigned may be sustained; but it is sufficient to entitle the plaintiff to judgment if any one of them be rightly assigned: and I agree with the Court that on the second breach the plaintiff is entitled to judgment. A covenant is nothing more than an agreement, in construing which we have only to look to the fair meaning of the parties to it: and if the agreement were in substance and effect that the defendant would sell and assign to the plaintiff the sole right of making and vending the medicine for his profit, and that the defendant would not interfere with him in making and vending it; that raises an implied covenant on the part of the defendant that he would not make and vend it; and if he do afterwards make and vend it, it is a breach of that implied covenant. Now here, by the deed of *July* 1805, the defendant recites

that

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that the plaintiff had agreed with him for the absolute purchase of all his right, share, and interest, as well in the said medicine, as in the said third part of the profits which had been before reserved to him; and then he proceeds to sell and assign to the plaintiff all that third part, and *all other right, title, and interest*, in the *medicine*; and using other general words, which would be sufficient to convey the other two thirds, if the first set of words were not sufficient. But it does not even rest there; for there follows a covenant by the defendant, that it should be lawful for the plaintiff at all times thereafter to prepare and sell the said medicines in the name of the defendant, and to receive the profits thereof for the plaintiff's sole use; and another covenant for further assurance, that the defendant would upon request do and execute all such further acts and deeds as should be advised for the more perfect and absolute assigning and assuring to the plaintiff *the said medicine* and copyright, and *all* the profits arising from the sale thereof. It appears therefore, by the language of the third deed alone, that the defendant contracted with the plaintiff that he should have the sole exercise of the right of making and selling these medicines for his own benefit: and then the question is whether the conduct of the defendant in interfering with that right which he had before conveyed to the plaintiff be not a breach of his covenant. As in *Pomfret* v. *Ricroft* (*a*) *Twysden* J. (who differed from the rest of the rest of the Court upon the case in judgment) agreed that the grant of a water-course implies a covenant by the grantor not to disturb by any act of his own the grantee in the enjoyment of it; and therefore that a subsequent act of disturbance by the grantor in

(*a*) 1 *Saund.* 322.

stopping

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ſtopping the watercourſe would give the grantee an action of covenant againſt him. And if one make a leaſe of a houſe and eſtovers, and afterwards cut down all the wood out of which the eſtovers were to be taken, the leſſee ſhall have his remedy by action of covenant againſt him; it being a misfeazance in him to annul or avoid his own grant. So in *Ruſſel* v. *Gulwel* (*a*), it was agreed that if one make a leaſe of lands, reſerving a right of way, or common, or other profit a prender; if the leſſee diſturb him in the enjoyment of the way, &c., covenant will lie for ſuch diſturbance. To apply the ſame principle to the preſent caſe: the defendant aſſigns by deed all his right, title, and intereſt in the making and vending of a certain medicine to the plaintiff; and afterwards he diſturbs him in the enjoyment of it by making and ſelling it on his own account: that therefore is in breach of his covenant.

Lord ELLENBOROUGH C. J. afterwards obſerved that no argument could be drawn from the opinion delivered by the Court to authorize the extenſion of the doctrine to the wrongful act of a ſtranger: but they conſidered the breach committed by the defendant as the retention and exerciſe of a right by him, the original proprietor, over the medicine which he had conveyed to the plaintiff.

Judgment for the Plaintiff
on the ſecond breach.

(*a*) *Cro. Eliz.* 657.

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Friday, Nov. 20th.

LOVE *against* PARKS.

A covenant in an indenture of lease for 21 years from *Michaelmas* that the tenant should not, during the term, cut down any of the coppice *of less than 10 years growth*, or at any unseasonable time of the year: *but at the end of the term the landlord agreed to pay to the tenant the value of all such growth of coppice as should be then standing and growing*; was held, according to its *grammatical* construction, (uncontrolled by any other part of the instrument shewing a different intent) to bind the landlord, to whom the words of the covenant were to be attributed, to pay the tenant for the value of all the coppice of *less than 10 years growth* left standing on the demised premises at the end of the term; though no special consideration appeared on the face of the deed for the landlord's agreeing to make a compensation to the tenant for the value of such part of the coppice, which the tenant was not entitled to cut. One Judge, who dissented, thought that the words "*such* growth" referred to a growth of 10 years, though inaccurately expressed; founded on a strong presumption of the meaning of the parties as gathered from the restriction on the tenant not to cut coppice of less than 10 years growth, and to the period of the year when the tenancy would end; which was before the cutting season, but after a portion of the coppice would be of 10 years growth.

THE plaintiff declared against the defendant in covenant upon an indenture of lease, dated the 30th of *May* 1786, and made between *O. Bowles* and *J. Luck*; whereby *Bowles*, for the considerations therein mentioned, demised to *Luck* certain lands; habendum to *Luck*, his executors, administrators, and assigns, for 21 years from *Michaelmas* then next, at a certain rent; by which indenture it was covenanted that *Luck*, his executors, &c. should not at any time during the term cut down any of the coppice or underwood, which at the time of making the said indenture were, or during the term should be, standing or growing upon the demised premises *of less than ten years growth*, or at any unseasonable time in the year, or in any unhusbandlike manner. But at the expiration of the term, *Bowles*, his heirs, &c. agreed to pay *Luck*, his executors, &c. the value of all *such* growth of coppice and underwood as should be then standing and growing; the same to be valued within two months of the expiration of the term by two appraisers, one to be chosen by each party. The declaration then stated that *Luck* entered on the premises, and died possessed on the 13th of *Jan.* 1792, having made *J. Garner* his executor, who entered and was possessed for the residue of the term:

and

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that while *Garner* was so possessed, viz. on the 27th of *Nov.* 1793, a writ of fieri facias issued out of *B. R.* to the sheriff of *Kent* to levy a debt of 2000*l.* and costs recovered against *Garner* as such executor by *T. Hilder*, by virtue of which the said indenture of lease was duly taken in execution and sold to the plaintiff for 320*l.*; and by an indorsement duly made thereon, attested, &c. and sealed with the seal of office of the said sheriff, was by him duly bargained, sold, and assigned to the plaintiff in consideration of 320*l.* paid by him: by virtue of which assignment the plaintiff entered, and was possessed for the residue of the term: and that while he was so possessed the reversion of the premises expectant on the determination of the said term legally came to and vested by assignment in the defendant. And then it proceeded to allege that, at the expiration of the term on the 29th of *September* 1807, the plaintiff delivered up possession of the premises to the defendant, at which time there were standing and growing thereon 100 acres of coppice and underwood of the value of 500*l.*, and which had been standing and growing thereon *for less than* 10 *years* and more than two months next before the expiration of the said term, and which were at such expiration of the term left by the plaintiff standing and growing upon the demised premises. And then it averred that the plaintiff within two months of the expiration of the term requested the defendant to chuse an appraiser to value the coppice and underwood on his part, &c. but the defendant refused, &c. and discharged the plaintiff from chusing one on his part, and had not at any time paid or tendered to the plaintiff the value of the said coppice and underwood; contrary to the said indenture, &c. to the plaintiff's damage of 500*l.* The defendant, after craving oyer of the indenture, which was

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set out at large, but which did not appear to aid the construction of the covenant in question, demurred generally.

Tindal, in support of the demurrer, contended that under the covenant stated, the landlord was only bound to pay the tenant the value of the coppice and underwood left standing on the premises at the end of the term, which was of the growth of 10 years and upwards. The tenant had no right to cut any of less growth; and it may be questioned whether the property in such as was of less than 10 years growth passed to him at all; but at any rate the sense of the thing speaks the true intention of the parties, that the landlord only agreed to make the tenant a compensation for that which he might have cut, but thought proper to leave for the benefit of the estate. It would be absurd for the landlord to agree to pay for that which the tenant had no right to take away: there would be no consideration for such an agreement. Such would have been the situation of the parties if this covenant had not been made; for the custom of the country regulates the cutting of coppice at certain periods of growth; and this will guide the Court in the construction of the covenant according to the intent of the parties. The parties must have contemplated that the tenant would have to cut two growths of 10 years each within the 21 years for which the term was granted: and as the season for cutting is after *Michaelmas*, when the term would expire in the 21st year, it was to be expected that the tenant would take the advantage of the last year's growth to increase the value of the coppice which he was entitled to cut at the end of the 20th year, or to take the benefit of a rising market, and also to observe his own covenant not to cut at an unseasonable time: and these considerations fairly

account

account for the undertaking of the landlord to pay the value of any coppice that might be left ſtanding on the premiſes of more than 10 years' growth; but it is impoſſible to account reaſonably for his agreeing to pay for that which was of leſs growth, which the tenant had no right to cut. The meaning of the word *ſuch* (ſuch growth) muſt be collected from the ſenſe of the whole covenant taken together: the mere words are not very intelligible; "*ſuch growth* of coppice as ſhould be then growing" is a very imperfect and incorrect mode of expreſſion, unleſs conſtrued by reference to the preceding part of the covenant to mean *ſuch coppice of* 10 *years' growth* as ſhould be then growing.

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Gurney, contrà, relied upon the words of the covenant according to their plain grammatical conſtruction. The landlord agrees in expreſs terms "at the expiration of "the term to pay to his tenant the value of all *ſuch* "growth of coppice as ſhould be then ſtanding and "growing:" the only growth mentioned before is "*of* "*leſs than* 10 *years' growth*;" it muſt therefore mean that he was to pay for all the coppice of *leſs* than 10 years' growth left ſtanding at the end of the term, and cannot by any rule of conſtruction ſignify a growth of *more* than 10 years. However reaſonable therefore the caſe ſuppoſed by the defendant's counſel may be, as a ground for conſtruing the agreement as he does, the anſwer is, that no ſuch caſe is expreſſed, or can be implied from the words of the covenant. And on the other hand, it may as well be ſuppoſed that as the landlord would have an intereſt in encouraging the tenant to nurſe and take care of the coppice, ſo that it might be in the beſt ſtate of growth when he reſumed the eſtate, that would be a reaſonable

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consideration to engage him to pay the tenant for it in proportion. He also observed, that the plaintiff was put under a disadvantage by the defendant having demurred instead of pleading issuably and going to trial; for then it would have appeared that the plaintiff had paid the preceding tenant for every thing that was left in the ground by him according to custom; and therefore the tenant was now entitled to stand on the strict words of the covenant.

Tindal replied, that if there were any custom which could affect the construction of the covenant, the plaintiff might have set it out, and the demurrer would have admitted it.

Lord ELLENBOROUGH C. J. This case turns upon the mere grammatical construction of the words of the covenant; for no argument can be derived from the body of the lease to assist materially in giving them any other sense: and if the grammatical construction be reasonably clear, I must put that construction upon them, though I cannot readily conceive why the landlord should agree to compensate the tenant for that which he would have been entitled to without making any compensation. I am led to believe that there may have been some ulterior consideration not expressed in the lease for this engagement by the landlord; but I cannot look to that, but only, as my predecessor said upon another occasion, to the four corners of the instrument, in order to discover the intention of the parties. The words of the covenant are—that the tenant shall not at any time during the term cut down any of the coppice growing upon the premises *of less than* 10 *years' growth*, or at any unseasonable time of the year, or in an

unhuſbandlike manner: but at the expiration of the term the landlord agrees to pay the tenant the value of all *ſuch* growth of coppice as ſhould be then ſtanding and growing. Now the only growth before mentioned is a growth *of leſs than* 10 *years*, and there is nothing elſe to which the word *ſuch* can refer. Then if the words of the covenant be plain, they muſt have their effect. If the landlord have been led by miſtake into this covenant, he muſt apply to a court of equity for relief; but I have no other guide in this caſe to come at the meaning of the parties than the grammatical conſtruction of the words; and by that, the words "*ſuch* growth" muſt be referred to the growth of *leſs than* 10 *years*, the only growth before ſpoken of. I do not know that this interpretation will be accorded to by all my Brothers.

Love *againſt* Parks.

Grose J. I agree that the plain conſtruction of the words is that which has been put upon them by my Lord. The landlord agrees to pay the value for *ſuch* growth of coppice as ſhould be ſtanding at the end of the term demiſed. What growth is that? The only growth before mentioned is one of *leſs than* 10 *years*; it muſt therefore refer to that.

Le Blanc J. I have the misfortune to differ from my Lord and my Brothers in the meaning of this covenant; but it ſtrikes me at preſent not to admit of ſo much doubt as to call in aid the principle of conſtruing the words moſt ſtrongly againſt the covenantor. This was a *Michaelmas* holding, and the tenant would accordingly leave the eſtate at *Michaelmas*; and I take it that, according to the uſual courſe of coppice land, there would at every *Michaelmas* be ſome portion of the coppice ſtanding which would be

 of

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of 10 years' growth according to the cuſtomary mode of computation in ſuch caſes; but the proper time for cutting which would not arrive till after the leaſe was expired. To this ſtate of things I think the covenant was meant to apply: the tenant was reſtrained from cutting coppice of leſs than 10 years' growth, or at any unſeaſonable time of the year; but at the expiration of the term the landlord agreed to pay the tenant the value of all *ſuch growth* of coppice as ſhould be then ſtanding; meaning by ſuch growth, as I underſtand the covenant, coppice of 10 *years' growth*, which the tenant was entitled to take at the ſeaſonable time of the year during the term. If the meaning of the parties had been that the tenant might cut all of 10 years' growth, and that the landlord ſhould pay for all of leſs than 10 years' growth ſtanding at the expiration of the term, I think the covenant would have been differently worded, and that it would have ſtipulated that the landlord ſhould pay for all the coppice that was left ſtanding, omitting the words "ſuch growth of:" they would have uſed fuller and plainer words than they have done to expreſs that intention. I am probably wrong in putting this conſtruction upon the covenant, as my Lord and my Brothers think differently; but after reading it again and again, this is the concluſion which I have come to.

Bayley J. It is poſſible that any conſtruction which the Court may adopt may be contrary to the real meaning of theſe parties; but when parties make uſe of ſuch uncertain terms as theſe in their contracts, the ſafeſt way is to go by the grammatical conſtruction; and if the ſenſe of the words be in equilibrio the rule of law will apply, verba chartarum fortius accipiuntur contra proferentem

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tem (*a*). But I think that the fenfe of the words grammatically confidered are againft the landlord. The word *as* which occurs afterwards in the fame fentence would come in ungrammatically without the previous word *fuch*; and "*fuch* growth" muft refer to the only growth before fpoken of, that is a growth of *lefs than* 10 *years*. Then not only the grammatical conftruction of the words is with the tenant, but that conftruction alfo falls in with the rule of law, that the words are to be taken moft ftrongly againft the party binding himfelf.

Judgment for the Plaintiff.

(*a*) Vide Co. *Lit.* 26.

Wigg and Another, Executors of Collier, *against* Shuttleworth.

Tuefday, Nov. 20th.

The defendant having covenanted in an indenture to pay the plaintiff 300*l.* at the end of a twelvemonth, and in the mean time, and until payment thereof, to pay intereft for it at 5 per cent.; it is no anfwer to an action of debt for the 300*l.* and intereft accrued thereon, to plead that by the fame indenture it was amongft other things covenanted that the defendant fhould pay the property tax *payable for and in refpect of the faid* 300*l.*: for the plea does not fhew that the covenant for the payment of the property tax attached on the intereft payable for the 300*l.* principal; and the covenants as there exhibited appear to be independent; and therefore though the latter fhould be void by the property tax act 46 *Geo.* 3. *c.* 65. *f.* 115. avoiding all contracts, covenants, &c. for the payment of any *intereft*, &c. in full, without allowing the deduction of the tax as directed by the act; yet that would not avoid the other independent covenant in the deed for the payment of the 300*l.* and intereft.

THE plaintiffs declared in debt for 325*l.* 10*s.* upon an indenture made the 20th of *Auguft* 1808 between *Collier* (the teftator,) and the defendant, whereby *Collier* fold and affigned to the defendant certain tenements demifed by indenture of leafe for the refidue of a term of 40 years then unexpired, together with a policy of infurance from fire; and fet out a covenant by the defendant that he would pay to *Collier* 300*l.* on the 20th of *Auguft* 1809: and in the mean time and until payment thereof, would pay intereft, at 5 per cent., half yearly: and then

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assigned a breach in non-payment of the 300*l.* after it became due, and of 25*l.* 10*s.* for interest accrued thereon.

Plea—that in and by the said indenture it was, amongst other things, covenanted and agreed between the defendant and *Collier*, that the defendant should pay and discharge the property tax which should become due and payable for and in respect of the said 300*l.*, contrary to the form of the statute; by means whereof and by force of the statute the said indenture is wholly void in law. To this there was a general demurrer: in support of

Bevan relied on the property tax act 46 *Geo.* 3. *c.* 65. *s.* 115. by which "all contracts, covenants, and agreements made or to be made for payment of any *interest*, rent, or other annual payment aforesaid, in full, *without allowing such deduction as aforesaid* (i. e. on account of the property tax) *shall be utterly void*." And he endeavoured to distinguish this case from *Gaskell* v. *King* (*a*), where a distinct and independent covenant in a lease, whereby the tenant bound himself to pay the property tax and all other taxes imposed on the premises, or on the landlord in respect thereof, though illegal and void in itself, did not avoid a separate covenant for payment of rent *clear of all parliamentary taxes*; the latter general words being understood of such taxes only as the tenant might *lawfully* engage to pay. Those upon the face of them were separate and independent covenants; but here the covenant by the defendant to discharge the property tax *for and in respect of the said* 300*l.* is necessarily part of the same covenant to pay the principal and interest, and varies the amount

(*a*) 11 *East*, 165.

of

of the sum to be paid to the covenantee in the first instance; making the contract usurious.

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WIGG
against
SHUTTLE-WORTH.

Reader, contrà, relied on the case cited, as in point with the plaintiffs; and observed that the covenants as here pleaded were even more clearly distinct and independent than they appeared to be in that case; for there, immediately after the defendant's covenant to pay to the plaintiff the rent, there followed, " and also shall well and truly pay the land tax, *property tax*, &c. imposed on the said premises," &c.: whereas here it is only pleaded that by the said indenture it was, *amongst other things*, covenanted, &c.; which seems to point to a distinct covenant.

Lord ELLENBOROUGH C. J. We must not go upon intendments to support the plea, for the purpose of cutting down the plaintiff's cause of action stated in the declaration; and the plea does not even shew how the covenant for the payment by the defendant of the plaintiff's property tax can attach upon the principal sum of 300*l.* to which it is there applied. But at any rate, in order to give effect to the objection upon the statute, the covenant stated in the plea should have appeared distinctly to be so interwoven with the covenant for the payment of the interest on the 300*l.* as necessarily to form part of the same covenant; but as they are exhibited to us, we cannot so connect them; and appearing to be independent covenants, the case then falls within the former decision in *Gaskell* v. *King*.

Per Curiam, Judgment for the Plaintiffs.

Tuesday, Nov. 20th.

ROUVEROY *against* ALEFSON.

Where the plaintiff, after arresting and holding the defendant to special bail for 50*l.*, took 20*l.* out of court which the defendant had paid in, and stayed further proceedings: held that that did not warrant an application for costs on the part of the defendant by the stat. 43. *G.* 3. *c.* 46. *f.* 3. against frivolous and vexatious arrests, which authorizes costs to be awarded to a defendant if the plaintiff do not *recover* the sum for which he held the defendant to bail, and had *no reasonable or probable cause* for holding him to bail to that amount.

LITTLEDALE moved upon the ſtat. 43 *Geo.* 3. *c.* 46. *ſ.* 3. for a rule on the plaintiff to ſhew cauſe why the defendant ſhould not have his coſts taxed; on the ground that the defendant had been arreſted and holden to bail for 50*l.*; and having paid 20*l.* into court, the plaintiff, after giving notice of trial, took the money out of court and ſtayed further proceedings. He referred to *Laidlaw* v. *Cockburn* (*a*), where the court of C. P. had granted ſuch a rule, though the defendants had been holden to bail only for 20*l.*, and had paid as much as 15*l.* 15*s.* 6*d.* into court: but he admitted that this court had refuſed the like application in two caſes, one of *Clarke* v. *Fiſher*, *T.* 44 *Geo.* 3. (*b*), and the other of *Linthwaite* v. *Bellings*, *T.* 45 *Geo.* 3. (*c*)

The Court (Ld. *Ellenborough* C. J. being abſent) adverted to the caſes cited in this court where the act had been held only to relate to caſes where the plaintiff did not *recover* (meaning by the verdict of the jury) the amount of the ſum for which he had arreſted and holden the defendant to ſpecial bail without reaſonable or probable cauſe; but they finally aſked whether *Littledale* could ſhew any vexation in the conduct of the plaintiff in this reſpect; and he admitting that he was not prepared to do ſo; they refuſed the rule (*d*).

(*a*) 2 *New Rep.* 76.
(*b*) *Hullock on Coſts* (2d edit.) 132., and 1 *Smith's Rep.* 428.
(*c*) 2 *Smith*, 667. (*d*) Vide *Cammack* v. *Gregory*, 10 *Eaſt*, 525.

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The KING *against* PIXLEY.

Wednesday, Nov. 21st.

The statute 34 *Geo.* 3. *c.* 68. *s.* 18. giving a summary conviction against any master of a vessel, who, having received the certificate of its registry, shall wilfully *detain and refuse to deliver up the same to the proper officers empowered to make registry,* &c. on the requisition of the owner or major part of the owners, will not authorize a conviction of a master who did not comply with the requisition of the owner, (though the *sole* owner,) to deliver up such certificate to *him*, though expressed to be for the purpose of his providing the necessary indorsement to be made on it at the custom-house upon the transfer of the ship to him.

THIS was a conviction by a magistrate, founded upon the ship registry act of the 34 *Geo.* 3. *c.* 68. *s.* 18.; which stated in substance, that on the 14th of *June*, 50 *Geo.* 3. at the *Thames* police office, &c. in *Middlesex*, *J. Graham* of *London*, merchant, sole owner of the ship *Hector*, came before *W. K.* Esq. one of the justices, &c. and gave information upon oath, &c. that *Wm. Pixley*, mariner, being the master of the ship *Hector*, then lying in the *West India* dock bason, in the hamlet of *Poplar* and *Blackwall*, in *Middlesex*, and having received the certificate of the registry thereof, did on the 14th of *June* in the year aforesaid *unlawfully and wilfully detain*, and *unlawfully refuse to deliver up the same to the proper officer empowered to make registry and grant certificate thereof*; on the said *J. Graham*, being the sole owner of the said ship, *requiring the defendant to deliver up the certificate of the registry of the said ship*; against the form of the statute, &c.; and whereby the defendant forfeited for his said offence 100*l*. That the defendant appeared and pleaded not guilty. That in support of the charge *J. Graham* produced and proved a bill of sale of the ship made on the 6th of *Jan.* 1810, whereby *R. Henry* and others, the then owners, sold and assigned to *Graham* the said ship, then being at sea on a voyage from *Jamaica* to *London*, in which bill of sale the certificate of the registry of the ship was duly recited. That *J. G.* a witness deposed, that on the said 14th of *June*, between 9 and 10 o'clock in the forenoon, he delivered a letter to the defendant on board the *Hector* at *Blackwall*, just before she entered the *West India* dock,

from

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from the ſaid *J. Graham*. That the witneſs then tendered the original bill of ſale to the defendant, but that he would not look at it. That the witneſs then gave the defendant a copy of the ſaid bill of ſale. That the ſaid letter was open, and directed the defendant to deliver up the certificate of regiſtry of the ſaid ſhip to the witneſs, who was to give him a receipt for it. That the letter expreſſed that the certificate was required in order to make an indorſement thereon, and that the witneſs then alſo verbally required the defendant *to deliver the ſaid certificate, in order that an indorſement might be made thereon at the cuſtom-houſe*, and informed the defendant that the ſaid *J. Graham* had purchaſed the ſhip. That the defendant anſwered that the ſhip was entered at the cuſtom-houſe, and that Mr. *Henry* (one of the former owners) had got the certificate. That the defendant called one *J. E.* as a witneſs in his defence, who depoſed that he, *J. E.*, was authorized on the evening of the 12th of *June* in the ſame year to receive the certificate of regiſtry of the ſhip *Hector* by Mr. *Henry*, and went on the ſame evening to *Graveſend*. That on the next morning he ſaw the defendant and obtained from him the certificate, and brought the defendant with him to town, and reported the ſhip that day; after which the defendant delivered the certificate to him, *J. E.*, and he returned to the counting-houſe and delivered it to Mr. *Henry*. That when *J. E.* demanded the regiſter of the ſhip, he did not in any manner ſignify to the defendant that diſpatch was neceſſary, as a negotiation was going on: that he told the defendant nothing relative to the transfer of the ſhip: that he did not believe that the defendant gave him the regiſter knowing that any other perſon had a right to the veſſel, nor that he had any means of knowing it: but the witneſs *J. E.* would not

ſign

sign his said examination. Thereupon it appeared to the convicting magistrate *that the said certificate of registry was not lost or mislaid, but was wilfully detained by the defendant*: and he convicted the defendant of the offence charged against him, according to the form of the statute; and adjudged him to forfeit 100*l*., to be applied as the law directs.

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Several objections were taken to this conviction; 1st, That the bill of sale mentioned in the conviction did not convey any interest in the ship to *J. Graham* the supposed owner, inasmuch as it does not appear that any copy of the bill of sale was delivered, or entry thereof indorsed on the affidavit pursuant to the stat. 34 *Geo.* 3. *c.* 68. *s.* 16. 2d, That it is not charged by the information, nor proved in evidence, that the defendant was required to deliver up the certificate of registry to the proper officer empowered to make registry. 3d, That the witness *J. G.*, mentioned in the conviction, did not shew to the defendant any sufficient authority entitling him to demand such certificate from the defendant. And, 4th, That it does not appear from any evidence adduced by the prosecutor that the defendant was possessed of the certificate at the time it was demanded; but on the contrary it was proved by the witness *J. E.* that he had delivered it up to the former owners before any demand made by *James Graham*. And *Peake* was proceeding to substantiate these objections: But

Lord ELLENBOROUGH C. J. called upon *Abbott*, who appeared in support of the conviction, to point out any provision in the act which required that the certificate of registry should be delivered by the master into the hands of any owner of the vessel, which was the only demand

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proved to have been made in this case upon the defendant. The 18th section only makes it an offence in the master who shall wilfully detain and refuse to deliver it up "*to the proper officers empowered to make the registry, and* "*grant a certificate thereof*," on the requisition of the owner or major part of the owners.

Abbott answered, that the substance of the offence was the wilful detainer of the certificate of registry by the defendant from the sole owner, who applied for it for the purpose of having an indorsement of the transfer made on it by the proper officer. That the defendant was informed at the time of the reason for making the application; and did not offer to take it himself to the proper officer. That the prior act of the 28 *Geo.* 3. *c.* 34. *s.* 13. in pari materiâ recites that masters of ships had wilfully and maliciously *detained and refused to deliver up* certificates of registry, *to the prejudice of the owner or owners;* without saying, refused to deliver up *to the proper officer:* and then enacts, that on complaint by the owner, &c. *whose certificate of registry shall be so detained and refused to be delivered up*, to any justice, &c. he shall cause the master to be brought before him to be examined *touching such detainer and refusal*, &c.

Lord Ellenborough C. J. It is true the reason alleged for requiring the certificate to be delivered up to the owner was to have an indorsement made on it at the custom-house; but the act does not require the master to deliver it up into the owner's possession at all; but it is to be put into indifferent hands, into the hands of the public officer for this purpose, where it may be considered as in the custody of the law: the requisition therefore

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from the owner to the defendant ought to have been shaped to that effect, in the terms of the clause. So far as the second act differs from the first, it must rather be considered as a repeal of the former. It is not necessary to say any thing as to the rest of the case.

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Per Curiam, Conviction quashed.

The KING *against* The Inhabitants of the County of SALOP.

Wednesday, Nov. 21st.

THIS was a presentment by a justice of peace, upon his own view, that from time immemorial there was and yet is a certain common bridge called *Pilson* bridge, over a brook or river called the *Sleepy Meese*, used for all the liege subjects, &c. *with their horses and on foot* to pass, &c., situate and being in the townships of *Pilson* and *Chetwynd*, in the parish of *Chetwynd*, in the county of *Salop*, in the king's common highway there leading from the market town of *Market Drayton* in the said county towards and unto the market town of *Newport*, in the county aforesaid: and that the bridge aforesaid, situate, &c. on the 13th *September*, 49 *G.* 3. and continually afterwards until the present day, was, and yet is, ruinous for want of due repair, &c., against the peace, &c. To this two of the inhabitants of the county appeared, and pleaded for themselves and the rest of the inhabitants of the county, (except the inhabitants of the said townships of *Pilson* and *Chetwynd*) that the inhabitants of the said townships, independent of the other inhabitants of the said county, from time immemorial, have been used and accustomed and of right ought to repair the said bridge

The inhabitants of the county, being primâ facie liable to repair all public bridges within it, are therefore, as it seems, bound to repair an ancient horse bridge, unless they shew that others are bound to repair the same.

The Court will take no cognizance of a special case reserved upon the trial of an indictment at the sessions.

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as often as occasion required: and that the said bridge is, and from time immemorial hath been used for the king's subjects, *with their horses and on foot only*, to pass, &c., and that the same hath not been used for the king's subjects, with their carriages, &c. to pass, &c.: and that the same bridge hath from time immemorial been situate in the townships of *Pilson* and *Chetwynd*; and that by reason of the premises the inhabitants of those townships, independently of the rest of the inhabitants of the said county, during all the time in the said presentment mentioned, ought to have repaired, and still of right ought to repair the said bridge: and traversed that the inhabitants of the county were bound to repair it. The presentment was tried at the sessions by a jury, who found the defendants guilty, *subject to the opinion of this Court on the following case.*

The bridge, comprised in the above presentment, is a horse-bridge, and not wide enough for a cart or other carriage to pass over it. The bridge is situate on one side of the public highway; the road for carriages being through the ford in the brook or river on the other side of the said highway. The bridge is situate, part in the township of *Chetwynd*, in the parish of *Chetwynd*, in the county of *Salop*, and the other part in the township of *Pilson*, in the said parish of *Chetwynd*, over the water which divides those townships, which townships have immemorially repaired their respective highways. No proof of any repairs having been ever done to the bridge, at the expence of the defendants, the inhabitants of the county of *Salop*, or any one else, was produced. The bridge is of public utility. And the question therefore was, whether the inhabitants of the said county were liable primâ facie to repair this horse and foot bridge, the same as if it were a carriage bridge.

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When this case was called on in the crown paper, Lord ELLENBOROUGH C. J. said—There is no doubt that a public *footway* or *bridleway* is a *highway* (*a*): it is a highway for foot passengers, or for horse passengers, &c.; and the parish is bound to repair it till they can throw the onus upon others. So all public bridges are primâ facie repairable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can shew that others are bound to repair particular bridges (*b*).

But it is quite a new thing that a case should be reserved upon the trial of an indictment by a jury at the sessions. It is a very great irregularity, and ought to be noticed in order to prevent the repetition of it. We shall take no notice of the case reserved.

The Attorney-General said that he should have felt it to be his duty, without adverting to what party he represented there, to point out such an irregularity to the Court. And *Park* and *Reader* (who were also concerned as counsel in the case) said that it was done by consent of both parties, (though they agreed that it was irregu-

(*a*) Vide *Allen* v. *Ormond*, 8 *East*, 4.

(*b*) *Rex* v. *The Inhabitants of the W. R. of Yorkshire*, 5 *Burr.* 2594. was the case of an ancient foot-bridge repaired by the inhabitants of the township of *Glusburne*; which bridge was taken down, and in lieu of it 60 yards above on the stream in the same highway was built a carriage-bridge, with the repairs of which the county was fixed. And vide *Rex* v *The Inhabitants of the W. R. of Yorkshire*, 2 *East*, 342; and *Rex* v. *The Inhabitants of Bucks*, 12 *East*, 192. upon the construction of the statute of bridges 22 *H.* 8. *c.* 5., which statute mentions *bridges* generally, without distinguishing between the different kinds of bridges: and Lord *Coke* (2 *Inst* 701.) observes that "the indictment upon this statute saith quod *pons publicus et communis* situs in altâ regiâ viâ super flumen, seu cursum aquæ," &c.

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larly done) as the readiest means of taking the opinion of the Court upon the point of law, meant to be raised; the object of which was answered by the opinion now expressed by the Court.

Lord Ellenborough C. J. The indictment is well removed by the certiorari: but we shall take no notice of the case: we shall leave the matter as it is, and pronounce no judgment upon it.

Thursday, Nov. 22d.

Marshall and Another *against* Poole and Another.

Where goods are sold and delivered upon an agreement by the vendee to pay for them by a bill at a certain date; as interest would have run upon such bill, if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods upon the common count for goods sold and delivered.

Littledale on a former day obtained a rule nisi for setting aside an inquisition, on the ground of the misdirection of the under-sheriff to the jury, in telling them that the plaintiffs were not entitled to interest. The plaintiffs declared on the common count for goods sold and delivered; and the proof was of an agreement dated "4th of *August* 1809.—Bought of *J.* and *B. Marshall* 130 bales of cotton on board the *Hercules*, at 15*d.* per *lb.*, to be delivered at *Liverpool*, on arrival. Payment *in bills* at 2 months, in 10 days after delivery." No bills were given, but the action was not brought till after the bills would have become due. The officer thought that a debt of that kind for goods sold and delivered would not carry interest; but particularly as the plaintiffs had not declared specially upon the agreement to pay *in bills*, but only on the common count for goods sold and delivered: and the jury found accordingly. But it was now urged that inasmuch as the bills, if given, would have carried

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interest, the plaintiffs ought not to be in a worse condition by the defendants' breach of their agreement; and that as the principal money was recoverable on the count for goods sold and delivered, that would also cover the amount of interest, which was merely accessorial to the principal demand. And he referred to *Becker* v. *Jones* (*a*), where the Exchequer Chamber allowed interest in a similar case upon the final judgment, from the service of the allowance of the writ of error, until affirmance of the judgment; though in that case there was a special count on the agreement. But there were, he said, many cases where interest had been recovered in actions of indebitatus assumpsit; and it was always recovered on counts upon bills of exchange, though it was not reserved upon the face of the bills. *Robinson* v. *Bland*, 2 *Burr*. 1077.

Richardson, on shewing cause, relied on *Gordon* v. *Swan* (*b*), where, though the goods were contracted to be paid for at a day certain, yet it was held that interest did not run from the day: and it can make no difference in reason, that here the goods were to be paid for *by a bill*, which is only a medium of fixing the payment at a certain day.

Lord ELLENBOROUGH C. J. In that case the effect of the agreement was only to entitle the vendee to credit for a certain time, so as to secure him from being called upon for payment till that time arrived: it was resolved therefore into a mere demand for goods sold and delivered, which has never been held to carry interest. But here the agreement is to give a security, which would carry in-

(*a*) *Ex. Ch. May* 1810. 2 *Camp*. 428. *n*.
(*b*) *Ib*. 429. and 12 *East*, 419.

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terest; and as the performance of the contract would have entitled the plaintiffs to interest upon the bill, they ought not to be prejudiced by the breach of it. And his Lordship asked if there were any case the other way?

Richardson admitted that *Becker* v. *Jones* was an authority against him on that point. But he then objected, 2dly, that the under-sheriff was right in his direction to the jury in this respect, upon this declaration, which was only in the common form for goods sold and delivered, and that is framed on an implied promise to pay the value of them *on demand*; which does not agree with the special contract shewn in evidence, to pay for them *by a bill* at a certain date: and though the Courts admit of this general form of declaring after the time of credit is expired (*a*), yet the plaintiffs cannot in that case claim the benefit of a contract different from that which they have stated upon the record; when that which is so stated would not, if strictly proved, entitle them to interest. [Ld. *Ellenborough* C. J. Could you not give a promissory note for money lent in evidence upon the common count for money lent, after the note was due?] Admitted: but the plaintiffs would not be entitled to recover interest on it in that mode of declaring. The only damage the plaintiffs here have to complain of is the non-payment of the price of the goods on demand, on which, by law, no interest is recoverable. When they abandoned their right to declare on the special contract, they abandoned their claim of interest on it. In *Tappenden* v. *Randal* (*b*), which was an action to recover back money

(*a*) Vide *Swancot* v. *Westgarth*, 4 *East*, 75. *Mussen* v. *Price*, *ib.* 147. and *Miller* v. *Shawe*, *ib.* 149.

(*b*) 2 *Bos* & *Pull.* 472. which refers to *Moses* v. *Macferlan*, 2 *Burr.* 1005. and *Walker* v. *Constable*, 1 *Bos.* & *Pull.* 306.

which

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which had been paid upon a void contract, one of the questions was, whether interest were recoverable upon that sum: but the Court held that in an action for money had and received, nothing but the real sum advanced, *without interest*, could be recovered. Different measures of value are recoverable in different actions for the same thing; as if goods be taken wrongfully from the owner and sold, he may bring trover, and recover the real value; or money had and received, and recover what the sale produced; or trespass, and recover damages for the taking and detention, as well as for the value of the goods.

Lord ELLENBOROUGH C. J. Interest may be considered in this case as parcel of the price of the goods sold and delivered: if they had been paid for at the time of delivery, the price would have been so much less; but being to be paid for by bill payable at a future day, the value was to be so much more in proportion to the interest which would have accrued upon the bill, if that had been given according to the agreement: therefore it seems to me that the amount of such interest may well be recovered upon the general count for goods sold and delivered, as part of the estimated value of the goods to be paid for in that manner.

The other Judges assenting.

Rule absolute.

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Friday, Nov. 23d.

ANDREWS and Others *against* WHITEHEAD and Another.

A count in an action on the case, stated that whereas heretofore, &c. the plaintiffs had agreed to purchase and the defendants to sell and deliver to them *at a certain rate or price per pound, to be paid in a manner then stipulated between them,* 40 bags of wool, *to be delivered* by the defendants to the plaintiffs, *at a time which, before the making of the promise of the defendants after-mentioned had elapsed,* but which wool had not then been delivered; and thereupon *in consideration of the premises,* and *also in consideration* that the plaintiffs would still receive and pay for the said wool, *at the rate or price and in manner last aforesaid,* on the delivery of it within a reasonable time; *the defendants promised* the plaintiffs to deliver the said wool accordingly within such reasonable time as aforesaid: and then alleged that though the plaintiffs, for a reasonable time after the defendants' promise, were ready and willing to receive and pay for the wool *at the rate or price and in manner last aforesaid*; yet the defendants would not deliver, &c: held that this was too general, and bad upon special demurrer; inasmuch as *no price and manner of payment* were mentioned, which were referred to in, and incorporated with, and made part of the consideration of, the new promise declared on; and without such price being stated, no measure was given to the jury for estimating the damage to the plaintiffs by the non-delivery of the goods.

IN an action on the case the second count stated, that whereas heretofore, to wit, on the 15th of *Dec.* 1808, at the parish, &c., the plaintiffs had agreed to purchase of the defendants, who had then and there agreed to sell and deliver to the plaintiffs, *at a certain rate or price per pound, to be paid in a manner then and there fixed and stipulated by and between them in that behalf,* divers other quantities, viz., from 30 to 40 other bags of wool, to be delivered by the defendants to the plaintiffs, *at a time which before and at the time of the making of the promise* and undertaking of the defendants hereinafter next mentioned *had elapsed*, but which last-mentioned wool had not then been delivered to the plaintiffs; and thereupon heretofore, to wit, on the 28th of *Jan.* 1809, at, &c. *in consideration of the premises*, and also in consideration that the plaintiffs at the instance and request of the defendants would still receive and pay for the said wool *at the rate or price, and in manner last aforesaid on the delivery of such wool to them* within a reasonable time then next following; the defendants undertook, and then and there promised the plaintiffs to deliver the said wool to them accordingly within such reasonable time as

aforesaid:

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aforesaid: and though the plaintiffs were always from the time of making the said promise for a reasonable time then next following, to wit, until and upon the 28th of *February* 1809, ready and willing to receive and pay for the said wool *at the rate or price and in manner last-aforesaid*; and after, during, and also at the expiration of such reasonable time as aforesaid, to wit, on the day and year last aforesaid, offered so to do, and requested the delivery of such wool accordingly, to wit, at, &c.; yet the defendants did not nor would, within a reasonable time next after making the said promise, or at any time before or on the said 28th of *February*, or within such reasonable time as aforesaid, deliver the said wool, &c.: and so it proceeded to allege damage to the plaintiffs from the non-performance by the defendants of the agreement in the usual form. The fourth count was in substance the same. The fifth count stated that whereas before the making of the promise and undertaking of the defendants, hereinafter next mentioned, the plaintiffs had agreed to purchase of the defendants, who had then and there agreed to sell and deliver to the plaintiffs other quantities of wool, consisting together of divers (viz., 120) bags of wool *at and for certain rates or prices agreed upon by and between them*, but at the time of making such their promise and undertaking hereinafter next mentioned the defendants had wrongfully omitted and neglected to deliver the said wools or any part thereof according to their said last-mentioned agreement, and had made default in the performance thereof in that respect: and thereupon afterwards, to wit, on the said 28th of *January* 1809, at, &c. *in consideration of the premises* last aforesaid, and also in consideration that the plaintiffs, at the instance and request of the defendants, would still receive and

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pay for the said last-mentioned wools *at the rates or prices aforesaid*, the defendants undertook, and then and there promised the plaintiffs, to deliver the said last-mentioned wools to them accordingly. And though the plaintiffs were always, from the time of making the promise last aforesaid for a reasonable time then next following, ready and willing to receive and pay for the said wools *at the rates and prices aforesaid*, and at the expiration of such reasonable time as last aforesaid, to wit, on the said 28th of *February* 1809, and before, offered so to do, and requested the delivery of the said wools accordingly, to wit, at, &c.: yet the defendants did not nor would within a reasonable time next after the making of their promise and undertaking last aforesaid, or when so requested as aforesaid, or at any other time, deliver to them the said wools; but during all that time and until and after the said 28th of *February* wholly refused and neglected so to do; whereby, &c.

To these counts the defendants demurred; and set forth these special causes, as to the 2d, 4th, and 5th counts: that it does not appear at what rates or prices per pound the defendants had agreed to sell the wool, nor at what time in certain they had agreed to deliver it; nor in what manner, nor at what time, the plaintiffs had agreed to pay for it. And further, as to the 5th count, that it does not appear that the defendants undertook and promised to deliver the wool upon request or within a reasonable time, or at any or what time in certain.

Taddy, in support of the demurrers, objected to the too great generality of all these counts, in which the essential terms of the original contract, which were referred to and made part of the contract declared upon, namely,

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the price of the goods and the time and manner of payment for them, are omitted in the statement of that contract; although each of those circumstances constitutes part of the consideration for the subsequent promise of the defendants. The rule of pleading in this respect was laid down by Lord *Ellenborough* in delivering the judgment of the Court in *Clarke* v. *Grey* (*a*); that the declaration must set out so much of any contract, consisting of several distinct parts and collateral provisions, as contains *the entire consideration for the act*, and the entire act which is to be done in virtue of such consideration. Now here it is only stated that the defendants had agreed to sell and deliver to the plaintiffs the goods *at a certain rate or price* per pound, (not saying what rate or price) *to be paid in a manner stipulated* between the parties (without shewing how stipulated) and to be delivered *at a time which was elapsed* before the promise was made (not stating when the delivery was to be made. [*The Court* suggested that the argument, e contrà, might be that the first agreement was laid as a consideration past, and mere inducement to the subsequent promise.] It might perhaps have been laid as inducement, but it is not so laid: the latter part of the count refers to the *price*, and *manner* of payment, as parts of the consideration of the promise: the promise is laid to be *in consideration of the premises*, and that the defendants would receive and pay for the wool *at the rate or price and in manner last aforesaid*, when no price or manner had been mentioned. So much of every agreement declared on should be stated, as that the Court may judge of its legal effect, and see that the stipulations of it are legal. But if an agreement for the sale and delivery of

(*a*) 6 *East*, 569.

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goods were made in the very terms ſtated on this record, not ſpecifying prices, mode of payment, or time of delivery, it would be void for the uncertainty of what the one party was to pay, and the other to perform. A promiſe to pay muſt be of a ſpecific ſum, or of what is reaſonably due: and ſo of the conſideration: for the convertible terms of the contract muſt be equally certain, in order to ſhew that the defendant might have a mutual remedy for the part of the contract ſtated as the conſideration. By the words, *in conſideration of the premiſes*, the whole of the antecedent agreements in the declaration forms part of the conſideration. The payment may, for any thing appearing to the contrary, have been ſtipulated to be made in a way which would create a condition precedent; as by a part payment, or by a bond to be ſealed and delivered, before the delivery of the wools: or it may have been ſtipulated to be made in a way which the law would deem uſurious. Suppoſe, inſtead of the general iſſue, a ſpecial plea, as anciently, was to be pleaded; in anſwer to the allegation that the plaintiffs "were ready and willing to receive and pay for the ſaid wool *at the rate or price and in manner laſt aforeſaid*, and requeſted the delivery of ſuch wool accordingly; but that the defendants would not deliver the ſaid wool," &c.; the defendants might have pleaded, that they were ready and willing to have delivered the ſaid wool *at the rate or price and in manner laſt aforeſaid*, but that the plaintiffs were not ready to pay for it *in manner aforeſaid*: and then the *modo et formâ* would have been part of the iſſue; and yet no manner of payment would be ſtated upon the record; ſo that it would be quite uncertain what fact was to be tried upon that iſſue. The action of aſſumpſit is in moſt

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instances a substitute for the action of debt, as appears in *Slade*'s case (*a*); but it is clear that debt for a *certain sum* to be paid in *a certain manner*, (neither mentioning *the sum* nor *the manner*,) would be bad. It was resolved (*b*) in that case, that every contract executory imports in itself an assumpsit; and therefore when one sells goods to another and agrees to deliver them at a day to come; and the other, in consideration thereof, agrees to pay so much money at such a day; both parties may have an action of debt, or on the case on assumpsit; for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt. And that the plaintiff in that action on the case on assumpsit should recover not only damages for the special loss, but also for the whole debt; so that a recovery or bar in that action would bar an action of debt on the same contract, and vice versâ. Now if the count do not disclose to the Court the essential terms of the contract, how can a recovery in the one action be pleaded in bar to another action on the same contract? If the contract be stated truly in the one, and thus generally in the other, it cannot appear to the Court to be the same contract. Thus, one of the objects of requiring reasonable certainty in pleading will be defeated. Wherefore in *Wiat* v. *Essington* (*c*), the plaintiff having declared in trespass for breaking his house, and taking away *divers goods and chattels* (not saying what goods) of his there found; after verdict, judgment was arrested; because a recovery in that action could not be pleaded in bar to another action for the same goods. This very general manner of pleading in case on assumpsit is of recent introduction, and

(*a*) 4 *Rep.* 94. (*b*) 3d & 4th Resol. *ib.* (*c*) 2 *Ld. Ray.* 1410.

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no precedents of the kind have until now been brought in review before the Court. The precedents in *Clift.* 91. 93. 96. and *Lib. Plac.* 18. (15.) all state the nature of the goods, the price, and time of delivery. Of the ancient precedents one in *Rastal's Entr. Action on the Case,* 6. *b.* 7. comes nearest to this: that is upon an assumpsit to deliver seisin of four acres purchased of the defendant within a certain time past: in the *recital* of the writ it is stated generally, that there was a certain agreement to do the act *in a certain time*; but in the count the purchase money is stated, and the promise of the defendant to deliver seisin within a certain time, *to wit, before the Feast, &c.* In *Wise* v. *Wise* (*a*) an executor declared in assumpsit, that the defendant, being indebted to his testator in 20*l.* which he ought to have paid him *according to an agreement between them*, promised to pay, &c.: and after verdict, judgment was arrested, because it did not appear what the agreement was, whether by deed, obligation, or how otherwise. But *Ward* v. *Harris* (*b*) may be relied on, where the declaration stated that, in consideration that the plaintiff had sold to the defendant a certain horse of the plaintiff *at and for a certain quantity of certain oil,* to be delivered within *a certain time,* which had elapsed before the suit commenced, the defendant promised to deliver the said oil accordingly: and a majority of the Court held this to be sufficient *after verdict*: but that does not conclude a case arising upon special demurrer. And Lord *Eldon* was of opinion that the declaration, not stating the value of the horse or of the oil, nor the quantity of the oil, did not state enough of the contract to warrant any judgment upon it, even after verdict; as he could not

(*a*) 2 *Lev.* 152. (*b*) 2 *Bos. & Pull.* 265.

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intend upon that general ſtatement what the contract proved was. Then further, as to the 5th count, it ſtates the breach of an agreement; which agreement is not ſtated, as the conſideration for the ſubſequent promiſe; it is not ſhewn therefore how the agreement was broken by the defendants. The promiſe to deliver is alſo ſtated too generally: it might be either to deliver upon requeſt, or upon payment, or at a time certain, or within a reaſonable time: which ever it was, it ought to have been ſtated. And if it be ſaid that upon a promiſe to deliver generally, the law will conſtrue it to be *upon requeſt*; that legal reſult ought to be ſtated: for it it is not ſufficient to ſtate evidence of the contract, but the legal effect of it muſt be ſtated, otherwiſe queſtions of law would be mixed with the facts on the record.

In the courſe of the argument Lord *Ellenborough* C. J. propoſed to the plaintiff's counſel to amend his declaration; ſaying that it would at any rate be better to make deciſive ſenſe than doubtful nonſenſe of theſe counts; and to ſtate the contract with certainty, rather than try experiments with how little ſenſe and meaning ſuch counts could be framed. But he anſwered that it might be more advantageous to his clients to have ſome of the counts in this general form if they could be ſupported, as he ſtill hoped they might. His Lordſhip referred to what was ſaid by Mr. Juſtice *Chambre* in the caſe of *Blakey* v. *Dixon* (*a*).

Marryat, contrà, then contended that however generally the contract referred to in theſe counts might be ſtated, yet as the time in which the delivery of the goods was to have been made, whatever it might have been,

(*a*) 2 *Boſ.* & *Pull.* 323.

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was passed at the time of making the promise on which the action was brought, the breach of such contract so laid was a sufficient consideration for the subsequent promise of the defendants. Where there is an agreement to deliver goods generally, the law implies that the delivery is to be made within a reasonable time; and what that reasonable time may be is a matter of evidence, arising out of all the circumstances of the case, and is not necessary to be stated with precision, or if stated under a videlicet, is unnecessary to be proved as laid: and where the action is brought, as it is here, for the non-delivery within a reasonable time, the price of the goods or manner of payment is wholly immaterial, and need not be stated: in like manner as if the action were brought for the non-delivery *at the price agreed upon*, the time of delivery when elapsed would be immaterial to be stated. But here the prior agreement which had been broken is not that on which the plaintiffs now sue; the time for its execution was gone by; it is merely stated as inducement for the subsequent promise declared on; the particular terms therefore of that agreement were no longer material to be inquired of or stated; it is a sufficient consideration for the subsequent promise that there had been an agreement for the sale and delivery of the wools by the defendants to the plaintiffs at a certain price, and to be paid for in a certain manner; (which price and manner of payment are mere matters of evidence in the assessment of the damages, and form no part of the consideration for the new promise) which agreement had been broken by the non-delivery of the goods *at a time* (as it is alleged) *which before the promise made by the defendants had elapsed.* The precise day, therefore, when that breach took place is nothing to the purpose; that consideration was gone by; and if any time had been stated;

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it muſt be admitted that it would not have been neceſſary to be proved, as laid: it would have been ſufficient to have proved, as here alleged, that the time had elapſed and the breach incurred before the promiſe of the defendants. And then the count proceeds, that *in conſideration of the premiſes*, (that is, of the previous breach of the agreement by the non-delivery of the goods by a time before then gone by) and alſo *in conſideration* that the plaintiffs would ſtill receive and pay for the wool *at the price and in manner laſt aforeſaid* (that is, in the paſt agreement) on the delivery of the goods within a reaſonable time afterwards, the defendants promiſed to deliver it within ſuch reaſonable time: and then it alleges a breach of that promiſe by the non-delivery within a reaſonable time, to wit, on or before the 28th of *February*. Now admitting that it is neceſſary for a plaintiff to ſtate the legal effect of every contract on which he declares, here every thing which was neceſſary to be proved by the plaintiffs is ſtated; and the objection is that other things, which if ſtated would not have been neceſſary to be proved as laid, and which are quite beſide the plaintiffs' gravamen, are not ſtated. If the parties had been reverſed, and the action had been brought to recover the price of the goods; then an averment of price would have been ſenſible and material. [*Bayley* J. Is not the price of the goods to be the meaſure of damages in this caſe ?] It is only neceſſary to allege a legal conſideration for the promiſe; the reſt is matter of evidence: the true meaſure of damages is the *value* of the goods, if delivered, to the purchaſer: and it can be no more neceſſary to notice the price of the goods in this caſe than in an action againſt a carrier for non-delivery of goods ſent by the ſeller to the buyer. If one agreed with another to build a houſe; though the contract ſhould

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specify the price of every article to be used in the building; yet, in an action for not building the house, it would not be necessary to set out the prices of the several articles. Less certainty too is required in pleading, in stating that which is within the defendants' own knowledge. *Com. Dig. Pleader*, (C.) 26. collects the cases. [*Bayley* J. That is where the matter lies *peculiarly* within the knowledge of the other party. Lord *Ellenborough* C. J. Is there any case which says that it is not necessary to state the *medium of payment* at least, so as to shew that it is a legal medium.] The allegation of *price*, generally, imports a *legal price*, and the Court will not intend that it is illegal: [Lord *Ellenborough* C. J. No intendment is to made either way; but the plaintiff, who is to recover upon the strength of his own case, is to shew that sufficiently to entitle himself.] In an action for the non-delivery of goods, or for goods sold and delivered, the goods may be contraband, but the Court will not intend that they are so, though not averred to be lawful goods: that is matter of evidence and not of statement. It is sufficient to shew an adequate consideration which does not appear on the face of it to be illegal. He then relied upon the case of *Ward* v. *Harris* (*a*), where the count, he contended, was more general than these: for there, neither the price of the horse nor of the oil was mentioned, nor even the quantity of the latter for which the horse was sold; the price of the horse being only stated to be "at and for a *certain* quantity of *certain* oil:" nor was the time of delivery mentioned, but only that it was "to be delivered within a certain time:" and yet this was held to be sufficiently stated after verdict. The

(*a*) 2 *Bos. & Pull.* 265.

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only inconvenience which can be suggested from this general mode of declaring is the difficulty of pleading a recovery in the action in case of a second action brought for the breach of the same contract: but the same objection applies more strongly to every count upon an indebitatus assumpsit. Then cui bono should the price of the goods or the time of delivery be stated, since, if stated under a videlicet, they need not be proved, as laid. In *Lee* v. *Walker* (a), which was an action on the case for the non-delivery of *Riga* flax, the plaintiff was nonsuited; because the proportionable quantities of the different sorts, and the time of arrival of the cargo, out of which the delivery was to be made, were not proved, as laid in the first special count. But because there was a general count, which only stated the contract to be for the delivery of *certain* quantities at *certain* prices generally, without specifying the quantities, prices, or time of delivery, this Court, on motion, sent the case to a new trial. [Lord *Ellenborough* C. J. The objection there did not arise upon special demurrer. *Le Blanc* J. This general mode

(a) *M* 50 *Geo.* 3 in this Court. The short and perhaps imperfect note which I took of the contract in this case, on hearing the report of the evidence read; which may, however, help to explain the allusion of the plaintiff's counsel; is this: — Sold to the plaintiffs 25 tons of *Riga* flax, on arrival of the first cargo we shall receive of our purchases on arrival for the ensuing season already made. To consist of a proportion of sorts.—The objections made to the first count, as I collected them at the time, (for I did not see the declaration,) were, first, that it alleged an absolute purchase made of 25 tons of *Riga* flax, then expected to arrive in and to be imported into this kingdom; whereas the contract proved was conditional, namely, for a purchase out of the first cargo that should arrive, on the arrival of such cargo: next, that the count alleged it to be a contract for an equal proportion of sorts; whereas by the contract the proportion of sorts was to depend upon the contents of the cargo which might first arrive. No objection was taken to the form of the second count, as being too general; but it was only considered as obviating by its generality the variance objected to between the contract proved, and that laid in the first count.

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of laying the goods to be sold for *a certain price*, without a videlicet at some *money* price, (which would tie the plaintiff down to prove a *money* price agreed to be paid, though not the precise sum laid,) would let him in to prove a *barter* price, to be paid for in other goods.] "A certain *price*" must be taken to mean a *money* price. [*Bayley* J. Supposing that were so; yet upon judgment by default, it would be left open to a *jury* to say what was the price meant.] Not more so than in other cases where there is judgment by default. [Lord *Ellenborough* C. J. It does not necessarily follow that the allegation of *a certain price* to be paid for goods means a *money* price; that might depend upon the place where the contract was made. If, for example, it were made on the coast of *Africa*, where commodities are sold by *barter*, it would be taken primâ facie to mean a *barter* price. And is it not an inconvenient uncertainty that the other party should be left in doubt whether the agreement, with the breach of which he is charged, were for the sale of goods at a money price, or for a barter price, or in what manner the price was to be paid?] In this country it would be taken to mean a *money* price: but all this goes to the estimate of damage, and is matter of evidence for the jury. In an action against a carrier for the non-delivery of goods, the price for which he agreed to carry is not stated (*a*); and yet that is part of the consideration for the duty: but the amount of the reward must have been considered as immaterial upon a question of non-delivery: and in *Clarke* v. *Grey* (*b*) the general form of declaring against carriers was sustained, after much consideration, though it was proved that the carriers had stipulated specially not to be

(*a*) *Vide* the precedent of *Dalston* v. *Janson*, in 3 *Ld. Ray.* 115., where the allegation is only that the carrier was to carry for *a reward*.

(*b*) 6 *East*, 564.

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accountable for more than 5*l.* for goods (and the goods lost were above that value) unless entered and paid for accordingly; which was not stated in the declaration: the Court considering it to be only necessary in that case, as in covenant, to set out so much of the contract, the breach of which gave the ground of action; (not omitting any part which went to qualify the contract as set out in the declaration;) but not that which only went to regulate the damages: and adding, that if the contract for safe carriage were equally broken by the loss of the goods, whether the sum stipulated to be paid on that account were much or little, it could not be said that such stipulation necessarily made a part of the contract for safe carriage (*a*).

Taddy in reply was stopped by the Court.

Lord ELLENBOROUGH C. J. It is not necessary to wander into the variety of topics which have been brought into the argument, in order to decide that these counts are bad. It is a radical fault of every one of them that in stating the consideration of the promise they profess to refer to a certain rate or price, before stated, at which the goods were to be delivered, when no rate or price whatever was before stated. Neither is it necessary to draw the line, and say how little information a declaration may give to the Court of the real contract be-

(*a*) The rule laid down in that case was, that it is sufficient in declaring upon any agreement, consisting of different parts, either under seal or not, to state so much of it only as constitutes that contract, the breach of which is complained of, prescribes the duty to be performed, *and the time, manner, and other circumstances of its performance:* with this difference only, that in case of an agreement not under seal, *the consideration must be stated,* and *no part of the entire consideration for any promise contained in the agreement can be omitted.*

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tween the parties; how nearly it may be reduced ad maciem et oſſa. But without laying down any general rules as to what manner of pleading is neceſſary or not in ſetting forth contracts; and admitting, for argument ſake, that certainty of price and time of delivery of the goods were not neceſſary to be ſtated in this caſe; yet, as the conſideration laid for the ſubſequent promiſe purports to refer to a rate or price before mentioned, and no rate or price was before mentioned, but only *a certain rate or price*; which rate or price no where appears; the objection, which is here pointed out by ſpecial demurrer, is well-founded. As to the caſe of *Ward* v. *Harris*, we may collect the inclination of the Court to have been to hold the declaration bad, if the queſtion had ariſen on ſpecial demurrer; the majority only holding it to be ſufficient as being after verdict. But how much more certain was that count than theſe: for it was a barter of *a horſe* for *oil*; and the only objection was, that the count did not ſtate the quantity or price of the oil: but ſtill the ſubject of the barter for the *horſe* was ſtated to be *oil*: whereas here the count refers to a rate or price *before mentioned* to be paid for the goods, when none was mentioned.

GROSE J. declared himſelf of the ſame opinion.

LE BLANC J. The counts are all too general. I agree that a preceding contract, after it is broken, need not be ſtated with the ſame preciſion as the immediate contract declared upon; but here there is uncertainty introduced into the contract declared upon, becauſe it refers to a rate or price, *before mentioned*, in the former contract which it adopts; and then the count ſtates that in con-

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ſideration that the plaintiffs would ſtill receive and pay for the wool *at the rate or price and in manner laſt aforeſaid*, &c. the defendants promiſed, &c.: but it is no-where ſtated what that rate or price was. And then again it is alleged that the plaintiffs were ready and willing to receive and pay for the wool *at the rate or price and in manner laſt aforeſaid*; but that is only ſaying that they were ready and willing to pay for the wool at an uncertain price and in an uncertain manner.

Bayley J. In many caſes it may not be neceſſary to ſtate the price of goods contracted to be delivered; but where the queſtion of damages is to depend entirely on what the price agreed on was; there, I think, it is neceſſary to ſtate the price. Now here the damages to the purchaſer for the non-delivery of the goods contracted for were to be eſtimated by the difference between their actual value and the price agreed upon: but the contract, as ſtated in theſe counts, gives no meaſure at all for the damages. Then ſuppoſe there was judgment by default, the jury would have to aſſeſs the damages without any ſtandard to refer to. I never before ſaw a declaration of this ſort containing general counts like theſe, without alſo a count in which the price of the goods was ſtated, and to which, therefore, the defendant could not demur; and that may account for the objection not having been before taken.

Judgment for the Defendants.

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Friday, Nov. 23d.

ELIZABETH ANN COXE, an Infant, by JOHN GORDON, her next Friend, *against* DAY.

Where a power of leafing was given to the father, tenant for life, and *after his deceafe*, to the fon, tenant for life; and the fon obtained a grant from the father of his life eftate (without noticing the power) fubject to a certain rent, with a power of re-entry for non-payment, &c.: held that the fon, during the lifetime of his father, could not leafe under the power.

Under a leafing power, with a condition (inter alia) for re-entry for non-payment of rent for 21 days, a leafe granted with a condition for re-entry for non payment of rent in 20 days, in cafe *no fufficient diftrefs can be taken on the premifes whereby to levy the rent*, &c. is not a good execution of the leafing power; fuch conditional power of re-entry being lefs beneficial to the remainder-man than an abfolute power of re-entry on non-payment of rent.

THE Mafter of the Rolls directed a cafe to be fent for the opinion of this Court, of which the following is the fubftance.

By indentures of leafe and releafe of *July* 1790, to which *Charles Weftley Coxe* and *Anne* his wife, both fince deceafed, *Charles Coxe*, the father of *C. W. Coxe*, and certain truftees, were parties; being the fettlement made after, in purfuance of articles before, the marriage of *C. W. Coxe* with *Anne Gordon* his wife; certain manors, meffuages, and lands, &c. in the county of *Wilts*, of which *C. W. Coxe* was then feifed in fee, were conveyed by him with his wife to the truftees to the ufe of *C. W. Coxe and his affigns* for life, fans wafte; remainder to the ufe of the truftees to preferve contingent remainders; remainder to the ufe of the firft and other fons of *C. W. Coxe* and *Anne* his wife in tail male; remainder to the ufe of all and every their daughter and daughters, equally to be divided if more than one, in tail general, &c. And by the fame indentures *Charles Coxe* and *C. W. Coxe* conveyed other lands in *Sapperton* and *Frampton Manfel* in *Gloucefterfhire*, (being part of the premifes demifed by the leafe of the 17th of *February* 1802 after mentioned) of which *C. Coxe*, the father, was then feifed for life, with remainder to his fon *C. W. Coxe* in fee, to the truftees, to the ufe of *C.*

Coxe and his assigns for life, sans waste; remainder to the use of *C. W. Coxe* and his assigns for life, sans waste; remainder to the use of the trustees during *C. W. Coxe's* life to preserve contingent remainders; with remainders to such and the same uses as were before stated in respect of the *Wilts* estate. The release also contained a power of leasing the *Gloucestershire* estate in these terms. Provided also, that it shall and may be lawful *to and for the said* C. Coxe *during his life*, and *after his decease to and for the said* C. W. Coxe during his life, from time to time, by indenture to demise all or any part of the premises, &c. to any person or persons, for any term or number of years not exceeding 21., in possession and not in reversion, or by way of future interest, without taking any fine or income or any matter or thing in the nature thereof for making such leases; and so as the lessees were not made dispunishable of waste, &c.; and reserving the best and most improved rent payable half-yearly during the continuance of such leases: *and so as in every such lease there be contained a condition of re-entry for non-payment of the rent reserved by the space of* 21. *days*: and so as the respective lessees execute counter parts, &c. And a corresponding power was extended to the copyholds, to demise them by copy of court roll, reserving the ancient rents, &c. By the same indenture of release *Charles Coxe* and *C. W. Coxe* conveyed to the trustees the prebend of *Tarlton*, and certain other lands in *Tarlton*, in the parish of *Rodmanton*, in *Gloucestershire* (comprizing the residue of the premises contained in the lease of the 17th of *February* 1802 hereafter mentioned) of which *C. Coxe* was then seised for the lives of himself and of *C. W. Coxe*, and of *Elizabeth Baldwin*, and the survivor of them, under a lease

Leasing power, as to freehold.

The same as to copyhold.

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made by the prebendary of *Tarlton*, at and under a certain yearly rent and services; habendum to the use of the trustees and their heirs during the lives of the said *C. Coxe* and *E. Baldwin*, and the survivor, upon trust out of the rents and profits of the said leasehold premises to pay the prebendal rent reserved, and perform the covenants of the lessee; and to renew the lease on the death of any of the cestui que vies, and as occasion should require, to the intent that there might always be three subsisting lives; and next to permit and suffer the clear rent thereof *to be received by the said* C. Coxe *and his assigns during his life; and after his decease*, upon trust, to permit and suffer the same rents *to be received by* C. W. Coxe, *and his assigns, during his life*; and after the decease of the survivor of *C. Coxe*, and *C. W. Coxe*, upon trust that the trustees should stand seised of all the said leaseholds, subject to the several trusts aforesaid, upon such trusts and for such intents and purposes as would best and nearest agree with the trusts before declared concerning the freeholds. And the release contained a power for leasing the said leasehold, as follows:—Provided that it shall and may be lawful for the said trustees, at the request of the person or persons who shall for the time being, by virtue of the trusts before declared, be entitled to the receipt and enjoyment of the rents and profits of the same leasehold, by indenture to make any underlease or leases of the same, &c. (with the like restrictions as in the former leasing power, as to the freehold.) By indentures of lease and release of the 26th and 27th of *March* 1792, between *C. Coxe* and *C. W. Coxe; C. Coxe*, for the considerations therein mentioned, conveyed to *C. W. Coxe*, his heirs and assigns, the manors and lands

Power of leasing the leasehold.

Indenture of lease and release of 1792, conveying the father's life estate to the son; subject, &c.

secondly

secondly released and conveyed by the indenture of settlement of the 9th of *July* 1790, and also the prebend of *Tarlton*, and the lands in *Tarlton*, in *Rodmanton*, in the county of *Gloucester*, thirdly released and conveyed by the same settlement; habendum to *C. W. Coxe*, his heirs and assigns, during the life of *C. Coxe*, subject to the proviso after mentioned: yielding and paying to the said *C. Coxe* the yearly rent of 1050*l.*, clear of all taxes and deductions, payable half-yearly, at *Michaelmas* and *Lady-day*. *Provided* that if the said yearly rent of 1050*l.*, or any part thereof, should be in arrear for 20 days next after the said days of payment, &c., "being lawfully demanded, *and no sufficient distress or distresses can be taken or found in or upon the said demised premises thereby granted, &c.*," or any part or parts thereof, it shall and may be lawful for the said *C. Coxe*, his heirs and assigns in and upon the said premises, &c. "to re-enter and the same to have again, re-possess, and "enjoy, and receive, and take the rents, issues, and "profits, &c., until the said rent and all arrears thereof, "together with the costs and charges of re-entry, and "re-taking the possession thereof shall be lawfully satisfied and paid; any thing therein contained to the "contrary notwithstanding." By indenture of lease of the 17th of *February* 1792, *C. W. Coxe*, in consideration of the yearly rents and covenants thereinafter reserved and contained on the part of the lessee to be paid and performed, demised to the defendant the farm at *Tarlton*, together with certain other lands in *Rodmanton* (before-mentioned), and also certain of the freehold lands lying in *Sapperton*, in the county of *Gloucester*, (excepting mines, timber, &c.) habendum to the defendant from the *Lady-day*

Proviso for re-entry.

Lease of 17th Feb 1792, by C. W. Coxe to the defendant.

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day next enſuing the date, for the term of 21 years, ſubject to the proviſo thereinafter contained: reſerving to *C. W. Coxe*, his heirs or aſſigns, the yearly rent of 800*l.*, payable half-yearly at *Michaelmas* and *Lady-day*: which leaſe contained the following proviſo of re-entry.

Proviſo of re-entry.

"*Provided* always, and theſe preſents are upon this expreſs condition, that in caſe the ſaid yearly rent of 800*l.*, or any part thereof, &c. ſhall be behind and unpaid in part or in all, by the ſpace of 20 days, &c. being lawfully demanded, *and no ſufficient diſtreſs or diſtreſſes can or may be had, taken, or found in or upon the ſaid demiſed premiſes, or ſome part thereof*, whereby to levy the ſame, and all arrears thereof, if any; or if the defendant, his executors, &c. ſhall ſell or aſſign over this indenture of leaſe, or the premiſes hereby demiſed, or any part thereof, &c., for all or any part of the ſaid demiſed term, except to his or their child or children, without the licence, in writing, of the ſaid *C. W. Coxe*, his heirs or aſſigns; or if the defendant, his executors, &c. do not pay and perform all the rents and covenants, &c. on the part of the leſſee, &c.: then it ſhall and may be lawful for the ſaid *C. W. Coxe*, his heirs, &c. to re-enter upon the ſaid demiſed premiſes,' &c. and the ſame to have again, re-poſſeſs, and re-enjoy as in his and their former eſtate, &c." The ſaid indenture of leaſe alſo contained a covenant that the leſſee ſhould lay out upon the premiſes, within the term demiſed, 1000*l.* in certain buildings and repairs; and that in caſe of any diſpute about the ſum expended, it ſhould be ſettled by bill delivered, or by a reference; *C. W. Coxe* finding rough timber and lime, and aſſiſting with his team, at convenient times. This inſtrument, though dated on the 17th of *February* 1802,

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was not delivered by *C. W. Coxe* until the 27th of *April* following (*a*); and the defendant at the same time executed and delivered a counterpart of such lease. The defendant took possession of the demised premises at *Lady-day* 1802, and laid out, pursuant to his said covenant for that purpose, 1000*l.* and several hundred pounds more in repairs and improvements of them. *Anne Coxe* died in *February* 1797; *C. W. Coxe*, her husband, died on the 9th of *March* 1806; and *C. Coxe*, the father, died on the 19th of *February* 1808. The plaintiff, *Elizabeth Anne Gordon* (late *Coxe*) was the only issue of the marriage of *C. W. Coxe* and *Anne* his wife; and the said plaintiff and *Joseph Kaye*, to whom a conveyance had been previously executed by the surviving trustee of that part of the premises demised by the said lease to the defendant, which consisted of the prebendal estate, in *Easter* term 1808 brought an ejectment against the defendant to recover the whole of the demised premises; which was tried at *Gloucester* in the summer of 1808, when the plaintiff recovered a verdict for the whole: but in *Hilary* term 1809 (*a*) the Court of *K. B.* set aside so much of the verdict as applied to the freehold part of the demised premises, and restrained it to the leasehold only, and judgment has been entered accordingly. The questions now reserved for the opinion of this Court were, 1st, whether *C. W. Coxe* had power to grant the said lease to the defendant, as to the freehold part of the demised premises, during the life of his father *C. Coxe*. 2dly, Whether the power of re-entry, reserved by the lease for non-payment of the rent, be or be not made in conformity to the power in the settlement for

(*a*) Vide *Doe d. Coxe* v. *Day*, 10 *East*, 427.

granting

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granting leases of the freehold part of the demised premises: and if not, whether the lease be not void on that ground. 3dly, Whether, in consequence of the lease to the defendant of the prebendal part of the demised premises being void at law, the lease be or be not valid as to the freehold part; the rent for the whole being entire: and in case the lease is valid as to the freehold part of the premises; whether the defendant will be liable to pay the whole rent for the same, or to have the rent apportioned?

Puller, for the plaintiff, contended, 1st, that the lease granted by *C. W. Coxe*, the son, during the life of his father, *C. Coxe*, of lands in which the father had a prior life estate, was not a valid lease warranted by the leasing power contained in the marriage settlement of *July* 1790: for the power was given to be exercised first, *by* C. Coxe *during his life*, and *after his decease* (and not till then) *by* C. W. Coxe *during his life*; whereas the lease in question was executed by *C. W. Coxe* alone, during his father's lifetime. Whatever may be the effect of the conveyance of the father's life interest to his son, by the release of *March* 1792, in a court of equity, the power must be construed strictly at law, and the execution must be in strict pursuance of it: and no qualifications in a leasing power can be dispensed with, except such as go to the destruction of the power itself (*a*): but here the qualification did not go to the destruction of the power, because after the conveyance of the father's life estate to the son, the latter could by applying to equity have compelled the father to join in executing a lease, if proper. It does not even appear to have been the intention of the parties

(*a*) *Winter* v. *Loveday*, *Carth.* 429.

to

to the conveyance of 1792 that the son alone should have the power of leasing reserved to the father by the prior deed of settlement; for what could then have prevented the son from taking a fine, and leasing to the tenant for a nominal rent; which would have been good as against the father and son during their lives; and where then, after the son's death, would have been the remedy of the father for his rent of 1050*l.* per annum, in case there was no sufficient distress on the premises: for if the lease were well executed under the power, the tenant would claim under the prior settlement. But if the father had intended to convey and transfer over to the son his power of leasing, he could not do so; for, according to Lady *Gresham's* case (*a*), a power to lease cannot be executed by attorney, but only by the party himself to whom it is personally given; and this rule is applied as well to authorities coupled with an interest as to naked authorities. And in *The Earl of Montague* v. *The Earl of Bath* (*b*), where the owner of the estate had made a voluntary settlement of it with a power of revocation by a certain instrument; the power not having been regularly revoked in the manner prescribed, was held to be as binding upon the party as if the restriction had been imposed upon him by another. The true meaning, however, of the power in question is, that the father and son should each in succession execute the leases made in his own lifetime. The power is given to the father alone, and not to him and *his assigns*, during his life, as it would have been if so intended. As to the second question, whether the proviso for re-entry in the lease be made in conformity to the power in the settlement; the proviso

(*a*) Cited in *Combes's* case, 9 *Rep.* 76. *a.* and *Palm.* 436.
(*b*) 2 *Ch. Rep.* 417. and 3 *Ch. Cas.* 107.

in

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in the leafe is only for the re-entry of the leffor, in cafe the rent fhall be in arrear for 20 days, *and there be no fufficient diftrefs upon the premifes whereby to levy the fame*; which is much lefs beneficial to the owner of the inheritance than the abfolute condition for re-entry required by the power in every fuch leafe *for non-payment of the rent referved by the fpace of* 21 *days*; without the neceffity of fhewing that there was no fufficient diftrefs upon the premifes; which it might be difficult to do. Courts of juftice, it is faid in *Taylor d. Atkins* v. *Horde* (*a*), have always looked with a jealous eye to fee that the conditions in favour of the next taker be purfued, not literally only, but fubftantially. The rent muft be referved *with all the beneficial circumftances*. And in *Orby* v. *Lord Mohun* (*b*) a leafe under a power referving the ancient rent, without fpecifying what that rent was, was held void by Lord Keeper *Cowper* and Lord C. J. *Trevor*, againft Lord *Holt*'s opinion; becaufe it put the remainder-man under a difficulty in declaring or avowing for the rent in arrear. [Lord *Ellenborough* C. J. There can be no doubt that it is more beneficial to the owner of the eftate to have a power of re-entry at once upon the tenant, upon non-payment of the rent within a certain time, than to have fuch a power only in cafe there fhall be no fufficient diftrefs upon the premifes from time to time as the rent fhall fall in arrear.] The 3d point, he admitted, was againft him, upon the authority of *Co. Lit.* 148. *b.*; which does not appear to have been queftioned. Lord *Coke* fays, "concerning the appointment of rents, there is a difference between a *grant*, and a *refervation* of a rent: for if a man be feifed of two acres of land; of one in fee fimple, and

(*a*) 1 *Burr.* 121. (*b*) 2 *Vern.* 531. 542. and 3 *Ch. Rep.* 102.

of

of another in tail; and by his deed grant a rent out of both in fee, in tail, for life, &c., and dieth; the land entailed is discharged, and the land in fee simple remains charged with the whole rent: for, against his own grant, he shall not take advantage of the weakness of his own estate in part. But if he make a gift in tail, a lease for life, or for years, of both acres; the donor or lessor dieth; the issue in tail avoideth the gift or lease; the rent shall be apportioned: for seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, the donee or lessee should not be charged with the whole rent, but that it should be apportioned rateably according to the value of the land, as *Littleton* here saith."

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Abbott contrà. As to the first question; it must be taken in a court of law that the conveyance from the father to the son was of his whole interest. The rent reserved is analagous to a fee farm rent, though it cannot be so called; and until the condition be broken the estate of the father is in the son. As to the possibility of the father being prejudiced by the transfer of this power to the son; it must be recollected that powers of this sort are introduced, not for the benefit of the tenant for life, but of the remainder-man. [Lord *Ellenborough* C. J. The power to lease for so long a term is for the benefit of the tenant for life: the qualifications only are for the benefit of those in remainder.] No lease however could be made without reserving the best rent; and therefore the father could not be prejudiced. The son then being assignee of the father's estate, the question is, whether he may not execute the power of leasing, although it be not in terms given to the father, *and his assigns.* Such a power was holden, in

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Edwards v. *Slater* (*a*), to be annexed to the estate of the tenant for life, and not merely collateral to it. And there are several cases to shew that if the tenant for life forfeit his estate, the power annexed to it is also gone. Then it follows that the person seised of that estate by a lawful conveyance may execute the power annexed to it. This case is the stronger in favor of the power passing with the estate; because the son, who was next in remainder, was as much interested, at least, in the due execution of the power as the father himself. Lady *Gresham's* case (*b*), which was determined at the assizes, is very distinguishable; for there the tenant had delegated his power to a stranger, to whom he had not assigned his estate. In *How* v. *Whitfield* (*c*), a power of leasing was held well executed by the assignee of a term to which such power was annexed: but there the power was given in express terms to the party and *his assigns*. 2dly, As to the sufficiency of the clause in the lease for re-entry, compared with the requisition of the power; admitting that there must be a substantial compliance with the terms of the power, and in a manner equally beneficial to the remainder-man, the question is, whether that has not been done in this instance? The power does not affect to specify the very terms of the clause to be introduced, but only to give the substance of it. The lease does in fact contain a condition of re-entry for non-payment of the rent reserved for 20 days; and not the less so, because it is only to be exercised if there be not a sufficient distress on the premises out of which the landlord may immediately satisfy himself for the rent due. The sole object of such a clause is to secure the rent; but if there be a sufficient

(*a*) *Hardr.* 415. (*b*) 9 *Rep.* 76 *a.*
(*c*) *T. Jones*, 110. and 1 *Ventr.* 339. S. C.

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diftrefs, that object is more immediately and effectually fecured than by re-entry. [Lord *Ellenborough* C. J. In the one cafe, it is to be fecured from time to time by fucceffive fuits, with the rifk of fureties if the diftrefs be replevied; in the other, it is fecured once for all by the landlord's re-poffeffing himfelf of the land out of which the rent is derived.] In fubftance it amounts to the fame thing; for at any time before the landlord recovers in ejectment for the forfeiture, the tenant coming in and paying the arrears and cofts will be relieved (*a*): it is therefore now become merely a claufe in terrorem. [Ld. *Ellenborough* C. J. Surely the direct power of re-entry is more beneficial to the landlord.] It was found to be fo difficult for the landlord to avail himfelf of the general power of re-entry for non-payment of rent at the day, on account of the precifion required in making the demand of rent, that the legiflature paffed the act of the 4 *Geo.* 2. *c.* 28. [Lord *Ellenborough* C. J. The very provifion of the legiflature fhews that there is a difference in this refpect.

Puller was ftopped in reply: and

Lord ELLENBOROUGH C. J. faid that the Court would certify their opinion to his Honor. And afterwards the following certificate was fent.

This cafe has been argued before us by counfel: we have confidered it, and are of opinion upon the firft queftion fubmitted to our confideration, that the faid *Charles Weftley Coxe* had not, during the life time of his father

(*a*) Vide ft. 4 *Geo.* 2. *c.* 28. recognizing fuch relief at law as well as in equity.

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Charles Coxe, power to grant the leafe to the faid defendant, as to the freehold part of the faid demifed premifes. And upon the fecond queftion, that the power of re-entry, referved in and by the faid leafe for non-payment of the rent, is not made in conformity to the power in the fettlement for granting leafes of the freehold part of the faid demifed premifes; and that the leafe is void on that ground.

The above opinion on the firft and fecond queftions made it unneceffary for us to enter upon the confideration of the third.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

Friday, Nov. 23d.

LOWNDES and Others, Affignees of LEES, a Bankrupt, *againft* ANDERSON and Others.

Bank notes cannot be followed by the legal owners into the hands of bonâ fide holders for a valuable confideration without notice. Therefore where a trader, after a commiffion of bankrupt iffued againft him, wifhing to redeem a bill of exchange which he had before remitted to his bankers, to whom he was indebted much beyond the amount, fecretly employed an unknown agent, in whofe hands he placed for that purpofe four other bills of about the fame value; and fuch agent, after endeavouring in vain to prevail on the bankers to take in exchange fuch four bills for the one, (which application was made as from and in the names of third perfons, though feconded by a letter from the trader to the bankers, received by them about the fame time,) paffed off the four bills in the market, and obtained bank notes for the fame, with which bank notes he took up the firft bill out of the bankers' hands in the ufual way: held that the affignees of the bankrupt trader could not recover from the bankers the amount of fuch bank notes, the produce of the four bills, part of the bankrupt's eftate, though difpofed of by him after his bankruptcy; the bankers having bonâ fide for a valuable confideration, and without notice of the true owners, received fuch bank notes.

THE plaintiffs declared in affumpfit upon the common money counts, for money lent, money paid, money had and received by the defendants to the ufe of the plaintiffs as affignees, and upon an account ftated between

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them; to which the defendants pleaded the general iſſue: and at the trial before Lord *Ellenborough* C. J. at *Guildhall*, a verdict was found for the plaintiffs for 2506*l.* 18*s.* 2*d.* ſubject to the opinion of the Court upon this caſe:

The plaintiffs are aſſignees of *William Lees*, a bankrupt, againſt whom a commiſſion iſſued, dated the 5th of *Auguſt* 1807, upon an act of bankruptcy committed on the 3d of that month. The defendants are bankers in *London*. On the 11th of *April* 1807 *Lees* paid or remitted to the defendants a bill of exchange, dated the 1ſt of *September* 1806, drawn by him and accepted by *Danſon* and *Walmſley* of *Lancaſter*, for 2509*l.* 19*s.* payable 12 months after date to the order of *Lees* the drawer, and indorſed by him, and alſo by *Gregſons* and Co. of *Liverpool*. The bill was paid to the defendants on a general banking account, and in the uſual way of buſineſs; and about the ſame time *Lees* drew ſeveral bills of exchange on the defendants to the amount of the ſaid bill or thereabouts, in the common courſe of buſineſs; *Lees* having been in the habit of making remittances to and drawing bills on them, as ſuited his own buſineſs: and *Lees* was, at the time he paid this bill for 2509*l.* 19*s.* to his bankers, and ſtill is, indebted to them for money advanced in a ſum very conſiderably above the amount of all their ſecurities. On the 27th of *July* 1807 *Lees* knew of his approaching inſolvency; and being particularly deſirous to get this bill for 2509*l.* 19*s.* into his poſſeſſion, deſired his clerk, *B. Preſcott*, to go to *London* immediately for that purpoſe; and on the 28th of *July* 1807 *Lees* gave *Preſcott* four bills to the amount of 2525*l.* 3*s.* 2*d.*, with which he that day ſet off for *London*, and was directed by *Lees* to do the buſineſs through the medium of a third perſon. On the 4th of *Auguſt Preſ-*

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cott, according to the inſtructions of *Lees* to employ a third perſon, gave theſe bills to a friend of his in *London*, who was unknown to the bankers, and requeſted him to go to the defendants and retire the bill for 2509*l.* 19*s.*; and ſoon after the ſtoppage of *Lees*, and before the defendants had heard of the commiſſion of bankrupt againſt him, this perſon called at the defendants' banking-houſe, in conſequence of the direction he had received from *Preſcott*, to take up the bill for 2509*l.* 19*s.*, and brought the bills of exchange for that purpoſe, which had been ſo given by *Lees* to *Preſcott*. The defendants aſked this perſon from whom he came? he ſaid he came to take up *Danſon* and *Walmſley*'s acceptance from *Lowndes* and *Bateſon*, who are merchants in *Liverpool*; and being aſked by the defendants, whether *Lowndes* and *Bateſon* would indorſe the bills, he ſaid he did not know. The defendants then refuſed to take the bills which were ſo offered to them. Some time after this, and after the middle of *Auguſt* 1807, the ſame perſon, in conſequence of the directions he had received from *Preſcott*, again offered bills to take up the bill for 2509*l.* 19*s.*; but the defendants refuſed to take the bills which were ſo offered on this ſecond application. On the day when this ſecond application was made, the defendants had received a letter from *Lees*, dated two days before, which ſtated the flouriſhing ſituation of his (*Lees'*) affairs, and that he had made arrangements to pay 15*s.* in the pound immediately, and was to pay or give ſecurity for the remaining 5*s.* in the pound, to be paid ſoon; that the reaſon why *Lees* wiſhed the defendants to take the bills they had before refuſed was, that he had ſome idea *Danſon* and *Walmſley*'s acceptance might not be paid when due at the place where it had been domiciled; but that if Mr. *Lowndes*

had

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had the acceptance of *Danson* and *Walmsley* in his possession, he had the means of payment in his own hands, and that it would be liquidated in that way: and the letter added, that the defendants by so doing would get their money immediately. The defendants destroyed this letter after the bill for 2509*l.* 19*s.* was given up by them, as hereinafter mentioned, as being indignant at the contents of such letter. On the 26th of *August* 1807 the same person, who had before applied to the defendants, paid to the defendants by *Prescott*'s directions 2510*l.* in bank notes, which *Prescott* had procured by discounting the bills which *Lees* had delivered to him, and received cash thereout 3*l.* 1*s.* 10*d.*; leaving a balance of 2506*l.* 18*s.* 2*d.*, being the amount of the bill for 2509*l.* 19*s.* deducting 9 days' discount; the bill not being due till the 4th of *September*; and the bill for 2509*l.* 19*s.* was then delivered up by the defendants. At the time of the second application for taking up the bill for 2509*l.* 19*s.* as aforesaid, the defendants knew of the bankruptcy of *Lees*. The defendants at the time of the payment, on the said 26th of *August*, knew that the commission against *Lees* had been issued. There was no other evidence that they knew that the bills offered, for the purpose of taking up *Danson* and *Walmsley*'s acceptance, were the property of *Lees*, nor that the cash they received was the produce of them, nor that the person who applied to them came from *Lees*. The question was, Whether the plaintiffs were entitled to recover? if they were, the present verdict was to stand: if otherwise, a nonsuit was to be entered.

Littledale for the plaintiffs contended, that they were entitled to recover the money in question, as being the

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produce of the bills which were delivered to *Prescott* by *Lees* before his bankruptcy, for the purpose of taking up the bill of 2509*l.* 19*s.* then in the hands of the defendants, and which bills upon the bankruptcy of *Lees* taking place, and before they were converted into bank notes, became the property of the assignees. [Lord *Ellenborough* C. J. What objection can there be to these defendants selling a bill of exchange, their property, for bank-notes.] The four bills being the property of the assignees in the hands of *Prescott*, the bank-notes which he received for them must equally be the property of the assignees; and these identical notes are traced into the hands of the defendants after the bankruptcy.

Lord ELLENBOROUGH C. J. It would be a grievous inconvenience if bank notes could be followed in the manner now attempted through the hands of bonâ fide holders for a valuable consideration, without notice. The defendants had before refused to exchange the bill for 2509*l.* 19*s.* for the four bills; but there was nothing to prevent their disposing of it, if they pleased, to any person who tendered them the amount in gold or bank notes. And when they afterwards, bonâ fide, for a valuable consideration, and without notice, received bank notes from a person who came to take up the bill, they cannot be held accountable for them. The case of *Clarke* v. *Shee* (*a*) is decisive upon the question.

GROSE J. concurred.

LE BLANC J. Suppose *Prescott*, after receiving the bank-notes for the bills, had spent any of them in postchaise

(*a*) *Cowp.* 200.

hire,

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hire, could the assignees have recovered the amount from the several innkeepers?

BAYLEY J. In *Clarke* v. *Shee* the rule is laid down generally, that where money or notes are paid bonâ fide and upon a valuable consideration, they shall never be brought back by the true owner.

Nonsuit to be entered (*a*).

Knox was to have argued for the defendants.

(*a*) Vide *Miller* v. *Race*, 1 *Burr.* 452. The following note upon the same subject was taken by me.

The holder of a Bank note is primâ facie entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privity. But where a Bank note for 500*l.* had been fraudulently obtained by some person unknown; and on its being presented for payment sometime afterwards by an agent of a foreign principal, information was given of the fraud; and the principal was desired to inform the Bank how he came by it; but the only account he would give of it was, that he had received it in payment of goods from a man dressed in such a way, of whom he knew nothing; and it was further proved that Bank notes of so large a value were not usually circulated in that foreign country; this was held to be sufficient evidence to be left to a jury of the principal's privity to the original fraud, in an action of trover brought by his agent to recover it from the Bank who had detained it under the authority of the original owner, to whom it properly belonged. And the question was not altered by the agent, who received it on account, having, after notice, made payments for his principal, which turned the balance in favour of such agent.

SOLOMONS v. The Bank of ENGLAND. *M.* 32 *G.* 3. 1791. *B. R.*—Trover for a bank note of 500*l.* At the trial, before Lord *Kenyon* C. J. at *Guildhall*, it appeared that the note in question had been fraudulently obtained by some person, by means of a forged draft, from *Batson* and Company, who acquainted the Bank therewith; and therefore when it was presented for payment at the Bank some time afterwards by the plaintiff, it was stopped, and the plaintiff was informed by the Bank of all the circumstances, and required to give an account how he came by it: this was on the 2d of *February* 1790. It appeared that he had received the note from *Hymen* and *Hendricks*, his correspondents, Jews living at *Middleburgh*, in a letter (which was read,) dated 27th of *January* 1790, wherein they informed him that they should draw upon him for the amount at some future period. The plaintiff, on presenting the note at the bank, had inquired whether it were a good one, it being of three years standing. In consequence of what then passed he, by the desire of the Bank, wrote to his correspondents at *Middleburgh*, to learn how they came by the note: the only answer, however, which was communicated to the bank, was in a letter from those correspondents to the plaintiff, that they had received it from a man dressed in such â way, in payment for goods, and that they knew nothing of him. Another letter was read on the part of the plaintiff from the same persons, dated 11th of *April* following; telling the plaintiff that they would not be amused by him any longer; that they should either draw upon him for the amount of the note, or expected that he would immediately return it to them, in case the Bank would not pay it. The note was stated to have been received

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by the plaintiff in reduction of a balance (1) due upon his correspondents' account. It further appeared in evidence that Bank notes of so large an amount as this were not usually current at *Middleburgh*.

Lord KENYON C. J., before whom this case was tried at *Guildhall*, stated to the jury, that inasmuch as it did not appear that the plaintiff himself had paid a valuable consideration for the note before notice, he should consider him as the agent of *Hymen* and *Hendricks*; and with respect to them, he was by no means satisfied in his own mind that they had properly accounted for their possession of it: whereupon the plaintiff's counsel desired to be nonsuited; which was done.

Bearcroft obtained a rule to shew cause why that nonsuit should not be set aside, on the ground that the holder of a Bank note was entitled to the payment of it on the mere production thereof, it being equivalent to money; and that no suspicion or fraud whatever would warrant a withholding of it, unless the fraud were brought home to the holder himself. That in this case there was no evidence whatever to impute fraud to the plaintiff, and that the proof of it lay affirmatively on the defendants, and not negatively on the holder of the note.

Erskine and *Piggott* shewed cause. They admitted from *Miller* v. *Race*, 1 *Burr.* 452. *Grant* v. *Vaughan*, 3 *Burr.* 1516. *Peacock* v. *Rhodes*, *Dougl.* 633. and other cases, that primâ facie the bearer of a Bank note was entitled to receive the money merely on the score of his possession, and that no other person was entitled to the note, unless he were also entitled to the money: and that whoever impeached his title must take the burden of proof upon himself. But the principle of all the cases was, that the party standing upon his possession was a bonâ fide holder, for a valuable consideration; and therefore the case did not apply to establish this plaintiff's right, who appeared upon the evidence not to be a holder for a valuable consideration before notice. It appears plainly from the letters, that on the 2d of *February* 1790, when he was informed by the Bank of all the facts relative to the note, he had not then advanced any consideration for it to his correspondents, from whom he only received it on the 27th of *January* preceding, and who then informed him that they should draw upon him for the amount at some future period. It is as plain that on the 11th of *April* he had not advanced any thing on the note; for they wrote to desire him either to pay the money or return the note. If after notice he thought proper to pay the money, the most he can claim is to stand in the shoes of *Hymen* and *Hendricks*, from whom he received it. Now as to them, sufficient evi-

(1) How this fact was did not appear with certainty on the evidence; namely, whether the balance due from *Hymen* and Co. to the plaintiff had accrued at the time when the note was first received by the plaintiff, or in the course of the transaction after notice by him of all the circumstances. But what is stated above is the evidence which was given of the plaintiff's conversation with the Bank officers, on being interrogated by them concerning his title to the note.

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dence was given to call on them to ſhew more eſpecially how they came by it. If the plaintiff, in order to avert the verdict which he ſaw hanging over his head, thought proper to be nonſuited, there is no ground for this Court to interfere; there being evidence enough to warrant the ſuſpicion intimated by the learned Judge.

Bearcroft, in ſupport of the rule, contended that upon ſettled principles of law, and on the broad ground of policy, the plaintiff was entitled to recover; and that there was no evidence here to warrant the intimation of opinion given by his lordſhip to the jury, to avert the conſequences of which the plaintiff had, in deference to that opinion, ſubmitted to a nonſuit. In one point of view the caſe was of great moment as it affected public policy, which was deeply intereſted in ſuſtaining the credit of the Bank abroad as well as here; which could only be done by giving the ſame currency to Bank notes as to the caſh itſelf which they repreſented, and for which they were always taken by the public. But if once the Bank were permitted to withhold payment upon the ſame grounds as would warrant it in the caſe of bills of exchange, the confidence of foreigners would be greatly ſhaken, and the circulation of theſe notes very much diminiſhed. But in point of law alſo, it appears from the caſes alluded to on the other ſide, that the bare poſſeſſion of a Bank note is ſufficient to entitle the poſſeſſor to payment, unleſs it appear by poſitive evidence that he himſelf came by it fraudulently.[a] Any fraud committed by any other perſon previouſly, in obtaining the note, is not ſufficient, unleſs it be alſo ſhewn that the poſſeſſor was privy to it. The burden of proof in all ſuch caſes reſts upon thoſe who object to the payment of it. Now here it was even proved on the part of the plaintiff, which was not neceſſary for him to do, that he had bonâ fide received this note from his correſpondents at *Middleburgh*, upon account, and in reduction of his balance. *His* title, therefore, was at all events unimpeached, whatever *theirs* might be. But even ſuppoſing the plaintiff's title reſted ultimately upon theirs, it was not ſufficient for the Bank to call upon them to ſhew how they came by the note. They were not bound to diſcloſe any thing. They had a right to receive payment, till the Bank had given evidence of their being concerned in the fraud by which the note was originally obtained; and no ſuch evidence was given. At all events that would not affect the plaintiff, who, ſo far from there being any evidence of his colluding with *Hendricks* and Co., appears from the letters to have been ſuſpected by them of an intention to cheat them by not returning either the money or the note.

Lord KENYON C. J. It is very certain that both policy and convenience require that Bank notes ſhould have the freeſt currency, and no other impediment ought to be put in the way of it than ſuch as mere juſtice requires. This is doing no more than would be the caſe even upon payment of money itſelf. For if this party had received money contrary to conſcience, it might have been recovered back again. As this caſe is now ſituated, I am glad that the opinion which I now hold will not prevent the party from making another appeal to the laws of the country, if he find that he can better his caſe. There is no doubt but the holder

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of a Bank note is entitled primâ facie to prompt payment: but if another party has been plundered of it before, and has applied to the Bank, can any impropriety be imputed to them for suspending the payment, till it is ascertained that the party tendering it for payment is not contaminated with the guilt. Upon this evidence I think *Solomons* must be considered to be in the same situation as *Hendricks* and Co. Now when they were informed of the circumstances, and applied to in order to give information from whom they received the note, they refused to give any satisfactory account of it. Under such circumstances it is impossible to say that there was not some suspicion thrown upon them of their being privy to the fraud; and that was all that I told the jury, to whom I was about to leave the question of fact for their decision, when the plaintiff, on such intimation of my opinion, desired to be nonsuited.

ASHHURST J. This is an application to our discretion. My Lord says he left the question of fraud to the jury; and what objection is there in point of law to it? On the evidence of suspicion which was given with respect to this note, the plaintiff ought to have given every possible account how his correspondents came by it, in order to clear them from the imputation of fraud; and this was not done: the suspicion, therefore, remains as it did before.

BULLER J. The plaintiff must be considered merely as the agent of *Hymen* and *Henricks*, and must stand or fall by their title. It is certainly enough in the case of a Bank note to shew possession, until the title is affected by evidence on the other side. Then see whether there was not evidence of that sort here, and whether it has been answered. It is proved by the defendants that the bill had originally been improperly obtained; that these parties had notice given them of it, and were applied to in order to learn how they came by it; that notes of this large amount are not usually current in the country where they reside, and therefore more easy to be remembered from whom received; and yet they have not thought proper to give any account of it This was certainly evidence enough to be left to the jury, which was offered to be done, whether these parties were not involved in the fraud.

GROSE J. I agree entirely with the plaintiff's counsel that Bank notes are to be considered as cash; and that the holder has a right, in the first instance, to say that he will not tell how he came by it: but on the other hand the Bank may take upon them the onus of fixing fraud upon the holder; and then it will be incumbent on him to clear himself from it. Now there were circumstances proved here to raise a reasonable presumption of fraud in these parties, and the plaintiff's counsel were so aware of this, and that the jury would probably decide against them, that they rather chose to be nonsuited. There is no ground, therefore, for the Court to interfere; especially as the party may, if he think proper, bring another action.

Rule discharged.

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The KING *against* THOMAS HAZELL.

Saturday, Nov. 24th.

BE it remembered that *at* Croydon, *in the county of* Surrey, on the 4th of *June*, 50 *Geo.* 3., *Thomas Hazell*, late of *Wallington*, in the county of *Surrey*, journeyman calico-printer, is convicted before us *J. R.* and *R. C.*, two of his majesty's justices of the peace for the county of *Surrey*, of having, within three calendar months last past, to wit, on the 21st of *March* last, (he the said *Thomas Hazell then* being lawfully employed by *George Savage*, &c., of *Wallington* aforesaid, in the county of *Surrey* aforesaid, calico-printers, in the manufacture, trade, or business of a calico-printer, carried on by them at *Wallington* aforesaid, and *whilst* he the said *T. H. was such workman, and was so employed as aforesaid*,) without a just or reasonable cause, refused to work with one *Joseph Bates*, the said *Joseph Bates* then also being a workmon employed by the said *George Savage*, &c., to work in the said manufacture, trade, or business of a calico-printer carried on by them at *Wallington* aforesaid; contrary to the statute made in the 39 & 40 *Geo.* 3., intitled, &c. And we the said justices do hereby order and adjudge the said *Thomas Hazell* for the said offence, to be committed to and confined in the common gaol for the said county for the space of three calendar months. (Signed by the justices.)

A conviction of a journeyman calico printer upon the stat. 39 & 40 *Geo.* 3. *c.* 106. and 41 *Geo* 3. *c.* 38. for refusing to work, &c., made by justices of the peace of the county of *Surrey*; stating that the defendant was employed by *G. S.* &c. *of* W. *in the said county*, in the manufacture or business of a calico printer, carried on by them *at* W. aforesaid; and that *whilst* the defendant was such workman and was employed as aforesaid, without reasonable cause, *he refused to work* with one *J. B.*, then also being a workman employed by the said *J. S.* &c. in the said manufacture, &c. *carried* on by them *at* W. *aforesaid*; is bad, for want of stating that *the defendant's refusal to work*, &c., which was the criminal act charged, was made *at* W. within the jurisdiction of the convicting magistrates. And this is not helped by a summary mode of conviction given by statute; in one of the blanks of which it is required to state *the offence*, without any blank specifically pointing to the *place*.

This conviction, founded on the stat. 39 & 40 *Geo.* 3. *c.* 106., and 41 *Geo.* 3. c. 38., which latter gives the ge-

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neral form of conviction, was confirmed on appeal by the sessions, and afterwards removed into this court by certiorari, where it was moved to be quashed upon two objections: 1st, that it does not state with sufficient certainty where the offence, if any, was committed; and therefore no jurisdiction was given to the convicting magistrates: 2dly, that the offence itself was not stated with sufficient certainty upon the face of the conviction (*a*).

Nolan and *Cowley*, in support of the conviction, were desired to confine their attention for the present to the first objection, which appeared to the Court to be decisive: and they urged that all the facts stated in the conviction were to be referred to the place named at the beginning of it, where no other venue was given: and the more so as this is a summary form of conviction given by the stat 41 *Geo.* 3. *c.* 38., which does not require the place to be stated, but considers that as matter of evidence, and sufficiently referred to, in the form given, by the title of the justices. The act in addition to that form only requires the justices to state *the offence*. Lord *Hale* (*b*) takes the distinction between an indictment for a misdemeanor, and for a felony; and says, that in the former the *adtunc et ibidem* need not be repeated to the several parts of the fact, as in cases of felony. And a conviction need not be more precise in its form than an indictment for a misdemeanor. They also referred to *The King* v. *Swallow* (*c*), where the conviction stated, that at *K.*, in the county of *N.*, the informer came before the

(*a*) Vide *Rex* v. *Neild and Others*, 6 *East*, 417.
(*b*) 2 *Hale*, P.C. 178. (*c*) 8 *Term Rep.* 284.

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justice, &c., and swore that on, &c. *at* W., in the said county, the defendant kept and used engines to destroy the game, &c.; and that on the 27th of *October*, (a subsequent day,) the defendant, having been summoned, *appeared* before the justice, &c. and pleaded, &c. and that on the said 27th of *October*, *at* H., in the said county, the witness deposed, &c.; and thereupon the defendant, *at* H. aforesaid, was convicted, &c. It was first objected, that it did not appear at what place the defendant was summoned to appear or did appear, so as to give the justice jurisdiction: but Lord *Kenyon* said, that it would be understood that the summons to appear, and the appearance, were *at* K., the place before mentioned. And here they said, that it must be intended that the refusal to work was *at the manufactory* stated to be *at* Wallington, *in the county of* Surrey, in which manufactory he was *employed to work.*

Lord ELLENBOROUGH C. J. We can intend nothing in favour of convictions, and we will intend nothing against them: but it must appear upon the face of the conviction, that the offence was committed within the county of the justices who convict the defendant, without which they can have no jurisdiction. The statute never meant to give these magistrates jurisdiction to inquire of this offence throughout every county: the allegation, therefore, that the offence was committed at some place within the county of which they were justices, is essential to give them jurisdiction. Now here it is stated, that there was a service to be performed by the defendant to his employers in the calico trade carried on by them at *Wallington* in *Surrey*; but no criminal act is stated to be done there. It is stated that he *refused to work* with

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another workman employed by the masters in the said manufactory carried on by them at *Wallington*; but where that refusal was given does not appear. Suppose the defendant had come up to town, and being applied to in the county of *Middlesex* to go to his work, had there declared that he would never go to *Wallington* to work again: such a case in proof would be consistent with this conviction; but that would not have been cognizable by justices of the county of *Surrey*.

GROSE J. The refusal to work, which is the offence charged, may have been given in one county, though he may have been employed to work in another.

LE BLANC J. The mention of *Wallington* is only as the place where the manufactory was; but it is not said that he refused to work *there*.

BAYLEY J. It is a refusal to work generally, and not a refusal to work while at the manufactory.

Lord ELLENBOROUGH C. J. added, that the words *then and there* were not to be exploded altogether: they had sometimes more meaning than some persons were aware of.

Conviction quashed.

The Attorney-General and *Andrews* were to have opposed the conviction.

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The stat. 43 *Eliz.* c. 2. s. 1. enacting that *the churchwardens* of every parish *and* 4, 3, or 2 substantial *householders* there, to be nominated by the magistrates, shall be *overseers of the poor*, requires an appointment to be made of *two* such *overseers* at the least *exclusive* of the existing *churchwardens*; which body so constituted, or the greater part of them, are empowered to execute certain duties relating to the poor: and therefore the 5th section, which authorizes "*the said churchwardens and overseers, or the greater part of them,*" (by the assent of two justices,) to bind out poor children apprentices, is not satisfied by a compulsory binding by *two* persons styling themselves *churchwardens and overseers*, who had been appointed the overseers of the parish at a time when *one* of them was *churchwarden*; which latter continued the sole churchwarden for about two months afterwards, when the other overseer was appointed sole churchwarden in his place. For at all events this power is given to a body constituted of more than two persons; though it may be executed by the major part of the body when well constituted. And therefore a poor child, assumed to be bound apprentice by such an indenture, could not gain a settlement by service under it.

TWO justices, by their order, removed *Lydia Rowland*, a pauper, from *Lambeth*, in *Surry*, to the parish of *All Saints* in *Derby*: the sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case:

The pauper, *Lydia Rowland*, a poor child of the parish of *Alvaston*, in *Derbyshire*, was, at the age of 13 years, with the consent of two justices of that county, by indenture, dated the 15th of *August* 1806, bound by *J. Eley* and *J. Williams*, in the said indenture denominated *churchwardens and overseers* of the poor of the said parish of *Alvaston*, to serve *M. Cope* of the parish of *All Saints*, in *Derby*, milliner, until she should attain the age of 21 years or day of marriage. The indentures were duly executed by the parties, and the pauper served under them in *All Saints* for nearly four years, when she ran away and became chargeable to *Lambeth* parish. *Eley* and *Williams* had been appointed overseers of *Alvaston* parish on the 12th of *April* 1806: *Williams* was at the time of that appointment *sole* churchwarden of the parish of *Alvaston*, and acted as such until the 6th of *June* in that year, when *Eley* was appointed in his room

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fole churchwarden for *Alvafton*, and fworn into that office. *Eley* and *Williams* were the only perfons filling the offices of churchwardens and overfeers for the parifh of *Alvafton* at the time when the indentures were executed, and no other perfon had been appointed to either of thofe offices for any part of the year 1806.

Nolan, in fupport of the order of feffions, contended that the indentures of apprenticefhip executed by two perfons duly appointed overfeers, one of whom was alfo appointed and acted as churchwarden, were fufficient in law, by the ftat. 43 *Eliz.* *c.* 2., to enable the apprentice to gain a fettlement under them. The 1ft fection of the act directs that " the *churchwardens* of every parifh, and " 4, 3, *or* 2 *fubftantial houfeholders* there, &c. fhall be called " *overfeers of the pooor:* and *they* or *the greater part of them* " fhall take order, &c. for fetting to work the children" of poor perfons, &c. Then by *f.* 5. " it fhall be lawful " for *the faid churchwardens and overfeers, or the greater* " *part of them*, by the affent of two juftices, &c., to " bind any fuch children as aforefaid to be apprentices, " &c.:" and all other acts to be done for the maintenance and relief of the poor are required to be done by the fame officers, or the greater part of them. From the nature and urgency of many of thefe acts it is manifeft that the legiflature muft have contemplated them to be done by the greater number of fuch parifh officers at any time exifting within the parifh: for it was not till the ftatute 17 *Geo.* 2. *c.* 38. *f.* 3. that in cafe of the death, removal from the parifh, or infolvency of an overfeer, the juftices were empowered to appoint another in his ftead; (and ftill there is no like provifion made for the appointment of a new churchwarden in the place of one

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dying, &c. within the year:) and it never could have been intended that if the major part of the churchwardens and overfeers died within the year, no provifion could be made for the poor by the remaining officers till the vacancies were fupplied. In *The King* v. *Hinckley* (*a*), a parifh indenture executed by one churchwarden and one overfeer only was holden good, by intending that by cuftom there was only one churchwarden in the parifh. But affuming that fuch a cuftom would be good, notwithftanding the canon (*b*) which requires two; it would be ftrange that if in fact there were but one churchwarden appointed by an irregular appointment, the two overfeers, being the major part of the whole number of officers, fhould not be as competent to do all neceffary acts for the relief of the poor as if there had been originally a good appointment of the three, and one of them had died. If this will not fuffice, there could not have been any legal rate made for the relief of the poor of this parifh. Here, however, one of the officers was appointed both overfeer and churchwarden; and as there is nothing incompatible in the two offices, and all the duties of each which refpect the poor are the fame, there feems to be no objection to their being held by the fame perfon. But the appointment of a fole churchwarden being bad, unlefs warranted by cuftom, and no fuch cuftom being ftated in this cafe; there was no legal churchwarden at the time of the appointment of the two perfons as overfeers, and therefore their appointment, as fuch, was good. Then again, if the offices of churchwarden and overfeer be incompatible, the appointment of one who was legally appointed overfeer for the year, could not be

(*a*) 12 *Eaft*, 361. (*b*) The 89th Canon of 1603.

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done away by his appointment during that period to an incompatible office, and ſtill leſs by an illegal appointment as ſole churchwarden, without any cuſtom ſtated to warrant it. There appears, therefore, to have been two legal overſeers appointed, which ſatisfies the requiſition of the ſtat. 43 *Eliz.*: and whether one of them might afterwards be legally appointed churchwarden, in which caſe there were two overſeers and one churchwarden appointed de facto; or whether the appointment of one as *ſole* chuchwarden, without a cuſtom to warrant it, or of the other, as filling at the time another office which he could not voluntarily relinquiſh, were bad; at any rate there was de facto an appointment of two overſeers, and another appointment of one churchwarden, and de facto there were two perſons filling one or other of theſe offices at the time, conſtituting *the greater part* within the words of the ſtatute: and the Court will not in theſe collateral caſes inquire whether they were officers de jure regularly appointed, when the legiſlature has given a direct mode of trying the validity of their appointments by appeal to the ſeſſions. [*Le Blanc* J. The great queſtion is whether theſe were de facto the major part of the churchwardens and overſeers: whether in a caſe where the ſtat. 43 *Eliz.* intended that there ſhould be two churchwardens and two overſeers, and that they or the greater part ſhould do certain acts, it did not mean that four perſons ſhould be appointed to fill thoſe offices; and whether an appointment of two only can ſatisfy the words of the act.] Suppoſing that to be ſo, and that the Court would compel by mandamus ſuch appointments to be made, ſtill if in fact a fewer number have been appointed, the major part of the exiſting officers at the time muſt, from the neceſſity of many of the

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duties to be performed, be competent to act. 16 *Vin. Abr.* 114. *tit. Officers and Offices* (G) 4. collects the cases of acts done by officers de facto which are valid. [Lord *Ellenborough* C. J. Supposing that an officer de facto would do in a case of this kind; yet, must there not under the statute of *Eliz.* be some one or more officer or officers, (without considering the question whether *one* churchwarden would satisfy the words of the statute, which speaks of churchwarden*s* in the plural;) besides the overseers appointed by the justices; for it says "the churchwardens of every parish *and* four, three, or two substantial householders there, &c." It first provides for the due constitution of the officers so composed, and then it points out the duties which they, or the greater part of them, are to perform: then can that provision be satisfied by an original appointment of two overseers alone, or of one churchwarden and one overseer? *Bayley* J. There is in fact only an appointment of one person to be overseer, besides the original churchwarden.] If one person cannot hold the two offices, so as to satisfy the meaning of the act, the case must be taken as if there were no appointment of churchwarden at all for the reasons before urged. Then if two overseers were regularly appointed, and no churchwarden were appointed, because perhaps the right of appointment was in dispute; or the churchwardens, if appointed, had died; it is difficult to conceive that such a construction should be put upon the act as would suspend the execution of the law altogether till the appointments were filled up: the poor might die for want in the mean time. In *The King* v. *Richardson* (*a*), where a charter directed an election of portmen, upon the death or removal of any, to

(*a*) 1 *Burr.* 517.

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be made "by the others, or residue of the portmen for "the time being, *or the greater part of them*;" Lord *Mansfield*, in delivering the judgment of the Court, said that if it had been material, (which in the event it was not) they were inclined to support an election made by the only remaining portman. The necessity for such a construction is the stronger in this case where the churchwardens and overseers are appointed by different persons and under different jurisdictions, so that there must be some interval between the several appointments: In *Rex* v. *Wymondham* (a) Lord *Kenyon* considered that a certificate signed by a majority of the parish officers de facto, as contra-distinguished from such officers de jure, would be valid. [Lord *Ellenborough* C. J. We are not inquiring at present whether these officers were duly appointed: but before we give effect to their act, we must see that there were a sufficient number of persons constituted to do the act, as required by the statute.] Then at all events the indenture was only voidable by the parties, and not absolutely void. The pauper, not disputing the competency of the officers to bind her, but submitting to serve under the indenture for more than 40 days, gained a settlement in the parish where she served. As where the stat. 5 *Eliz.* c. 41. avoids indentures of apprenticeship made otherwise than is thereby appointed, i. e. for 7 years at the least; yet an indenture of apprenticeship for a less time (b); or in the case of a female, till 21 ab-

(a) 6 *Term Rep.* 553. But see the report of Ld. *Kenyon*'s judgment in that case, explained and corrected by *Lawrence* J. in *Rex* v. *Clifton*, 2 *East*, 175. and vide also *Rex* v. *Martyr*, ante, 55.

(b) *Rex* v. *St. Nicholas*, in *Ipswich*, *Burr.* S. C. 91. *Rex* v. *Gainsborough*, *ib.* 586. *Rex* v. *Chalbury*, 1 *Const's Bott*, 610. *pl.* 848. and *Rex* v. *Woolstanton*, *ib. pl.* 849.

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ſolutely, without the alternative of marriage (*a*); has been holden to be only voidable by the parties. [Lord *Ellenborough* C. J. If the apprentice were not bound by a competent authority in this caſe, may not the objection be gone into at any time?] If this had been the caſe of a voluntary binding, no doubt the indenture would have been good: then if the one party aſſume the authority to bind, and the other agree to ſubmit to it without compulſion, there is no reaſon why it ſhould not operate with reſpect to third parties, to confer a ſettlement, the ſame as in thoſe caſes under the ſtat. 5 *Eliz.*

Clarke, contrà. The words of the ſtat. 43 *Eliz. c.* 2. decide the firſt queſtion; for that directs that *the churchwardens, and* 4, 3, *or* 2 *houſeholders to be nominated, &c.* ſhall be called overſeers of the poor, and that *they* or *the greater part of them* ſhall take order, &c.: the churchwardens therefore are an eſſential conſtituent part of the body to whom the authority in queſtion is given. And this conſtruction is fortified by the ſtat. 13 & 14 *Car.* 2. *c.* 12. *ſ.* 21. and 17 *Geo.* 2. *c.* 38. *ſ.* 15. which enables the overſeers of townſhips, where there are no churchwardens, to execute all the powers for the neceſſary relief of the poor, as are appointed by thoſe and the former ſtatutes of *Elizabeth* to be executed by the churchwardens and overſeers. Now here, without conſidering which of theſe appointments is good, and which is bad; it is clear that if there were a proper appointment in either inſtance of a churchwarden, there was but one overſeer; and if there were a proper appointment of two overſeers as directed by the ſtatute of *Elizabeth*, then there was no appointment of churchwarden; be-

(*a*) *Rex* v. *St. Petrox*, *Burr.* S. C. 248.

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caufe, whether the offices were in themfelves incompatible or not, it was manifeftly the intention of the ftatute that, for this purpofe, they fhould be executed by different perfons, for the better fecurity of the parifhes and of the poor. In order therefore to make any act of theirs effectual to bind the parifh, there could not have been lefs than a conftituted body of two overfeers and one churchwarden at leaft appointed at the time; (without confidering whether one churchwarden would fuffice, particularly when no cuftom is found to appoint only one:) though, when fo conftituted, the majority of the whole number would have been competent to bind the apprentice. If it were neceffary however to confider the legality of the appointments, it feems that one of the perfons being churchwarden at the time of his appointment to be overfeer, fuch appointment was abfolutely void; becaufe the ftatute directing the appointment of overfeers to be made, who, together with the churchwardens, fhould take order for the relief and management of the poor, thereby virtually excludes the appointment of one who is then a churchwarden to be overfeer, and renders him incompetent to be appointed: the appointment therefore was not merely voidable, but abfolutely void. But then it is faid that the other, being originally a good overfeer, could not for the fame reafon be appointed churchwarden in the courfe of his year of office; and that the firft churchwarden, when he went out of that office, became at leaft an overfeer de facto, and acted as fuch, under the original appointment: but when he ceafed to be churchwarden, he could not be fet up again as an overfeer to bind the parifh under the former void appointment, but he ought to have been appointed to the office de novo. Next, it is argued that the

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the indenture is at moſt only voidable and not void; but that does not apply to caſes where the defect of authority is in the perſons themſelves who do the act, and not merely in the manner of doing it. In the caſes cited of bindings under the ſtat. 5 *Eliz.* for leſs than 7 years, the indentures were good ſo far as they went, but they did not go far enough. And this cannot be compared to a voluntary binding; for the apprentice did not execute the indenture, but was compelled to be bound by thoſe who had no authority for the purpoſe.

Lord ELLENBOROUGH C. J. A ſettlement is conferred on one who ſerves under a compulſory binding, which the ſtat. 43 *Eliz.* enables to be made of poor children by the churchwardens and overſeers, or the greater part of them, by the aſſent of two juſtices: but if this were not a compulſory binding under the ſtatute, cadet queſtio. The ſtatute begins by conſtituting the body to whom it entruſts the relief and management of the poor in the ſeveral reſpects ſtated; and theſe are *the churchwardens* of every pariſh, *and four, three, or two* ſubſtantial houſeholders there, to be nominated yearly at *Eaſter*, under the hands and ſeals of two or more juſtices, &c.: and theſe are to be called overſeers of the poor: and then it proceeds to point out the duties to be executed by the body ſo conſtituted, and ſays that *they or the greater part of them* ſhall take order from time to time, &c. The ſtatute, therefore, requires that there ſhall be overſeers appointed under the hands and ſeals of the magiſtrates, diſtinct from the churchwardens, to execute theſe powers. Now here at the time of the execution of this indenture there were only one churchwarden and one overſeer; or if there were two overſeers, there was no churchwarden in the

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parifh; the ftatute therefore was not complied with, becaufe there was no fuch body conftituted as is thereby required for this purpofe. There then was no compulfion upon the party affumed to be bound by fuch compulfory act of thefe officers, but fhe was free all the time; and confequently no fettlement could be gained by her as an apprentice bound by this indenture under the ftatute.

GROSE J. In order to give effect to the indenture of apprenticefhip, there muft have been fuch a binding as was compulfory not only upon the perfon to be bound, but upon the perfon who was to take the apprentice: and here there has been no fuch binding. The ftatute of *Elizabeth*, requiring that the feveral duties there fpecified fhould be executed by the churchwardens, and by two at leaft overfeers, to be appointed by the magiftrates, certainly meant that thofe feveral characters fhould be reprefented by different perfons.

LE BLANC J. The fettlement here depends upon a fervice under indentures of apprenticefhip, whereby two perfons, naming themfelves churchwardens and overfeers of the parifh of *Alverfton*, have affumed to bind out a poor child apprentice under the provifion of the ftat. 43 *Eliz.*: and the queftion is, whether they had fufficient jurifdiction to make fuch a binding? By that ftatute, which gives the authority to make compulfory bindings of poor children under the circumftances there ftated, fuch authority is to be executed by "*the faid* "*churchwardens and overfeers, or the greater part of them,* "by the affent of two juftices," &c. Thefe are the officers defcribed in the firft part of the act, which directs

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that *the churchwardens* of every parifh, AND *four, three, or two* fubftantial *houfeholders* there, to be nominated under the hands and feals of two or more juftices, fhall take order from time to time, with the confent of the juftices, for fetting to work the children of all fuch whofe parents fhall not, "by the faid churchwardens and overfeers, or the greater part of them," be thought able to maintain their children. It is clear from this, that the appointment of one overfeer in addition to the churchwardens, would not be a fufficient compliance with the requifition of the ftatute, which looks to a greater body of perfons to manage the poor in each parifh, and that fuch body muft confift of at leaft two overfeers to act together with another defcription of perfons, the churchwardens of the fame parifh, for this purpofe: the ftatute, therefore, looks to a body confifting at the leaft of more than two perfons. Now here one of the two perfons chofen to be overfeers in the firft inftance was already churchwarden of the parifh, fo that in effect there was only one overfeer chofen: and when the firft churchwarden went out of office in *June*, the other overfeer was chofen churchwarden in his place: therefore there was never more than one overfeer, befides the churchwarden; which is clearly bad; and the body never confifted of more than two perfons; whereas the ftatute requires that there fhall be two overfeers at leaft, diftinct from the churchwardens, and that the aggregate body fhall confift of at leaft more than two perfons.

BAYLEY J. To give the pauper a fettlement in this cafe as an apprentice, there muft have been a competent compulfory binding by competent perfons, as required by the ftatute; that is, by the churchwardens and over-

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feers of the parifh, of which latter there cannot be lefs than two, by the affent of two juftices of the peace. Now it has been holden (*a*), that if the affent of the two magiftrates be given feparately, that will avoid the indenture, becaufe it leffens one of the checks impofed by the legiflature on this fpecies of binding. By the fame rule, then, if there be not a competent body of parifh officers, by whom or the greater part of them confent may be given to the binding, as the ftatute requires, it muft equally avoid the indenture. Now here there was in effect an appointment of only one overfeer; for the ftatute requiring that the *churchwardens* of the parifh, *and* four, three, or two *houfeholders* there, to be nominated by the juftices, fhould be overfeers; and that they or the greater part of them fhould execute this amongft other duties; muft have intended an appointment of two other houfeholders at leaft to be overfeers, exclufive of the churchwardens, and certainly looked to a body confifting of more than two perfons.

Orders quafhed.

(*a*) *Rex* v. *Hamftall Ridware*, 3 *Term Rep.* 380.

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The KING *against* The Truftees for the Burgeffes, &c. of TEWKESBURY.

Saturday, Nov. 24th.

An act of the 48 *Geo* 3. having vefted the aftermath of a certain meadow in truftees, in truft for the burgeffes and principal houfeholders of *Tewkefbury*, freed from all other intereft in the fame; with power to let the fame, or any part or parts thereof, annually, to any perfon or perfons for the beft rent, *and alfo to let it* IN PASTURES, for horfes, cattle, and fheep, to different perfons, at fuch rates, and fubject to fuch regulations as the truftees fhould appoint; or by writing under their hands and feals to demife the fame for a term of years, &c; and that the rents and profits fhould, after payment of all charges, be divided by the truftees amongft the objects of the truft: held that the truftees, not having let the aftermath to any perfons for any certain term, or in any certain proportions, but having let it out (as it was called) *in paftures*, at fo much a head for horfes, cattle, and fheep, to various perfons, muft themfelves be taken to be the occupiers of the land, and were confequently rateable for the fame.

UPON an appeal againft the poor rates after mentioned, tried at the borough feffions of *Tewkefbury*, between the truftees appointed by an act of the 48 *Geo.* 3. for the burgeffes or freemen and principal houfeholders of the borough, appellants, and the churchwardens and overfeers of the parifh of *Tewkefbury*, refpondents; the feffions were of opinion that the truftees having taken in cattle to tack on the *Severn Ham* after mentioned, and it being impoffible to rate the feveral perfons fending their cattle there, the truftees themfelves muft be confidered as the occupiers, and liable to fuch rates; and therefore confirmed the fame, fubject to the opinion of this court on the following cafe:

The firft of the rates appealed againft was made on the 13th of *October* 1809, as follows:

Rent.	Occupiers.	What affeffed.	Rate.
330*l.*	Truftees of the *Severn Ham.*	Aftermath of the "*Severn Ham.*"	16*l.* 10*s.*

The other rate was made on the 5th of *January* 1810, in the fame form; the only difference being in the fum affeffed, which was 24*l.* 15*s.* There is a large meadow in the parifh of *Tewkefbury* called the *Severn Ham*, belonging to feveral different owners and proprietors. Before the paffing of the act of the 48 *Geo.* 3., intitled,

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intitled, "An act for inclosing lands in the borough and parishes of *Tewkesbury*, in the county of *Gloucester*, and for vesting the after or latter math of a meadow called *Severn Ham*, within the said borough and parish, in trustees for certain purposes," the burgesses or freemen of the borough of *Tewkesbury* resident within the borough for the time being, and the occupiers for the time being of certain houses situate within the borough, were entitled to a right of common, for a limited number of their own cattle only, in the *Severn Ham*, from the 12th of *August* to the 13th of *February* in every year, both inclusive; which right of common was, according to the form and effect of the said act, afterwards suspended by order of the commissioners therein named; and the after or latter math of the *Severn Ham* was by the act declared to be vested in certain trustees therein mentioned and their successors to be appointed by virtue thereof, by the name of "The trustees for the burgesses or freemen and principal householders of the borough of *Tewkesbury*, in the county of *Gloucester*, appointed by an act passed in the 48 *Geo.* 3." "for ever freed and discharged of and from all right, title, and interest, claim and demand whatsoever, which any person or persons could or might have in or to the same, or any part or parcel thereof; upon the trusts nevertheless therein declared concerning the same." And by the act it was further enacted, "that it should and might be lawful to and for the said trustees, or any nine or more of them, at any of their meetings to be holden in pursuance of that act, and they were empowered, *to let and set annually the after or latter math of the said meadow*, called *Severn Ham*, so vested in them as aforesaid, *or any part or parts thereof*, to any person or persons whomsoever, at the best and most improved

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yearly rent or rents that could be reafonably had or obtained for the fame; and alfo *to let and fet the after or latter math of the faid meadow* called *Severn Ham*, *in paftures* for horfes, cattle, and fheep, to different perfons, at fuch rates, and fubject to fuch rules and regulations, as the faid truftees or any nine or more of them fhould (fubject to the reftrictions in that act contained,) from time to time appoint; or by writing under their hands and feals, to leafe or demife the after or latter math of the faid meadow called *Severn Ham*, (fubject to fuch reftrictions as aforefaid,) to any perfon or perfons whomfoever, for fuch term or number of years, and in fuch manner, as by the faid act is defcribed. And that the rents and profits arifing from the after or latter math of the faid meadow called *Severn Ham* fhould, after the payment of all cofts, charges, and expences incident to and attending the execution of the feveral powers to be by the faid truftees exercifed by virtue of that act, in the month of *April* in every year, be paid and divided by the faid truftees unto and between fuch burgeffes or freemen of the borough of *Tewkefbury* aforefaid, and fuch occupiers of houfes within the faid borough, as would refpectively have been entitled to rights of common in, over, and upon the faid meadow, if that act had not paffed, according to their refpective rights and interefts." On the 12th of *Auguft* 1809, the truftees, not being able to let the faid aftermath together for a fum equal in their judgment to its value, *let it out in paftures, at a certain fum per head for horfes, cattle, and fheep, to various perfons*, under the authority of the faid act, for fums of money amounting together to 295*l.*, but fubject to expences of between 30*l.* and 40*l.* The feveral perfons who took the aftermath in paftures, enjoyed the fame by turning in

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their cattle from the 12th of *August* 1809 to the 13th of *February* 1810; and the trustees did not occupy it, unless such letting and enjoyment in pursuance thereof amount in law to an occupation by them. No alteration has been made since the passing of the act in the proportion of the poor-rates of the parish, assessed on the occupiers of the said houses there who were previously entitled to such right of common on the *Severn Ham*; nor has any deduction been made from the assessments in consequence of the alterations introduced by the act. The question was, Whether the trustees were liable to be rated in respect of the after or latter math? If they were, the rates and order of sessions were to be confirmed: if not, the rates were to be amended accordingly.

Gurney supported the order of sessions confirming the rates on the trustees, as the occupiers of the aftermath of the *Severn Ham*, the property of which was vested in them by the act, and who were in the immediate perception of the profits collected from the several persons who turned in their cattle upon it at so much a head. It is impossible to consider the owners of the cattle as the occupiers of the land. The trustees are empowered to let it for a year or for a term of years, or if they cannot do that, they are authorized to let it out *in pastures*, as they have done. He referred to *The King* v. *Fairclough and Others* (a), as coming nearest to the present case; where the rector leased all his tithes to the defendants, and they let the same to the respective tenants, who paid the defendants 3*s*. an acre for the same; and it was held that the defendants were properly rated for the tithes as the occupiers.

(a) 8 *Mod.* 61.

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Abbott, contrà. The only intereſt of the truſtees is that which is veſted in them by the act for purpoſes there ſpecified not beneficial to themſelves, but to others: and they are only authorized to let the meadow out for a year or years, or to let it out *in paſtures*. [Lord *Ellenborough* C. J. What is that more than taking in cattle to agiſt (*a*)?] If that be ſo, the truſtees muſt be admitted to be the occupiers: but the letting out the land *in paſtures* includes an intereſt in the land itſelf, and not a mere agiſtment. As in *Rex* v. *Watſon* (*b*), where the corporation of *Huntingdon* was ſeiſed of common land, which was annually meted out to certain reſident burgeſſes who choſe to ſtock it, upon payment by each of a certain ſum to the other burgeſſes who did not ſtock the land: it was held that thoſe who ſtocked, though eighty in number, were tenants in common of the land, and conſequently rateable each for his occupation. [Lord *Ellenborough* C. J. There, each was in poſſeſſion of a diſtinct intereſt in the land, as in the caſe of a cattle-gate (*c*), for which he might have maintained an ejectment.] That was not the caſe of a cattle-gate, which is a diſtinct and ſeveral intereſt in the land, paſſing by leaſe and releaſe: but there the fee was in the corporation, though the enjoyment of the land was in the individual burgeſſes. [Lord *Ellenborough* C. J. The corporation there could not take in the

(*a*) An agiſter has a poſſeſſion of and ſpecial property in the cattle whereon he may maintain treſpaſs againſt any who takes them. 4 *Inſt.* 293. 2 *Rol. Abr.* 551. and *Rex* v. *Woodward*, 2 *Eaſt's P. C.* 653. Lord *Rolle* refers to the Year-book of *M.* 48 *Ed.* 3. 20. *b*; and there, after the rule of law was given by the Court, the iſſue was taken to the country, whether, or not, the beaſts taken were agiſted at the time upon the land of the plaintiff.

(*b*) 5 *Eaſt*, 480.

(*c*) A cattle-gate in a ſtinted paſture is a tenement, the occupation of which was held to confer a ſettlement in *Rex* v. *Whixley*, 1 *Term Rep.* 137.

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cattle of a ſtranger: but here the truſtees may contract with any perſons to take in their cattle by the year, or by the month, or week: and here not being able to let it altogether, they took in the cattle of different perſons at ſo much a head. Who then can be ſaid to be the occupiers, if they are not, in this caſe?] The act requires the truſtees to *let it out* IN PASTURES: by which muſt be underſtood to let the paſturage of the land; the calculation of the rent by the number of the cattle turned on does not vary the nature of the letting.

Lord Ellenborough C. J. The letting is at ſo much a head, without any definite time, or for any definite portion of the aftermath: nor were the truſtees bound to limit the number of cattle; though they might have done ſo.

Grose J. agreed.

Le Blanc J. The perſons whoſe cattle were taken in had no definite portion of the aftermath let to them.

Bayley J. In the *Huntingdon* caſe, the portions of thoſe who had a right to ſtock were aſcertained: but here there was nothing to limit the truſtees from taking in others.

Order of ſeſſions confirmed.

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Saturday, Nov. 24th.

After action brought in *B. R.* for board *and lodging* of the defendant's wife in *Middlesex*, which was referred to an arbitrator, who awarded less than 5*l.*, which was for *the rent* of the lodgings: this was held at any rate to come within the 13th section of the stat. 39 & 40 *G.* 3. *c.* 104. excepting actions for rent from the compulsory jurisdiction of the *London* Court of Requests; although the defendant were otherwise within the act: but without deciding whether the clerk of a solicitor attending at his Master's office within the city during the hours of business throughout the whole day, but lodging in *Middlesex*, shall be said to *seek a livelihood* in *London* within the meaning of the act.

THIS was an action of assumpsit for board and lodging and other necessaries provided by the plaintiff for the defendant's wife, who lived separately from him. The venue was laid in *London*; and at the sittings there before Lord *Ellenborough* C. J., a verdict was taken by consent for the plaintiff for 20*l.* subject to the award of an arbitrator, to whom all matters in difference were referred by a rule of the Court at nisi prius; and who afterwards directed the verdict to be entered for the plaintiff for 3*l.* 14*s.* only. Whereupon in order to oust the plaintiff of his costs, on entering up judgment for that sum, it was moved on a former day to enter a suggestion upon the roll, under the stat. 39 & 40 *Geo.* 3. *c.* 104., that the original cause of action did not exceed 5*l.*, and that the same was recoverable in the *London* Court of Requests. The facts disclosed by the affidavits were that the cause of action arose in *Middlesex*; that the plaintiff lived there, and the defendant also lodged and dieted in the same county; but that every day (excepting *Sundays*) from 9 in the morning till 9 at night, the defendant attended as a clerk in the office of Messrs. *Kaye* and *Freshfield*, solicitors, within the city of *London*.

Gaselee, on shewing cause against recording the suggestion, objected, 1st, that this being a recovery by the award of a referee was not within the act (*a*).

(*a*) No stress was laid upon this objection, and no further notice was taken of it; a verdict having in fact been entered for the sum awarded. The material words of the 12th section are that "*if any action or suit be* "*commenced* in any other court than the Court of Requests for a debt not "exceeding 5*l*, and recoverable by the act, &c in the said Court of Re-"quests, the plaintiff shall not, by reason of a *verdict* for him *or otherwise*, "be entitled to any costs," &c And vide *Darsley* v. *Day*, 8 *East*, 239.

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2dly, That this was not the case of a defendant *seeking a livelihood*" within the meaning of the 5th clause; which must be confined by the context to one who seeks his livelihood by residing or inhabiting in or keeping any house, warehouse, shop, shed, stall, or stand, *sub jure*, within the jurisdiction of the court, where he might be lawfully served with the summons: but here the plaintiff could not have gone into Messrs. *K.* and *F.*'s office against their consent to summon the defendant, without committing a trespass. He referred to *Gray* v. *Cook* (*a*) where a market gardener renting a shed in *Fleet-market* at an annual rent, but occupying it only for certain hours in the day on three days in the week, (it being open to others, who occupied it at other times) was held not to be within the act; which was a stronger case than this; because, during such his occupation, he held it suo jure. And to *Skinner* v. *Davis* (*b*), where a porter plying in the city, and resorting to a house of call there, but lodging elsewhere, was also held to be out of the act. 3dly, That part of the plaintiff's demand being for rent for the lodging of the wife, the case was within the exception of the 13th clause, which provides that the act shall not extend to actions for rent, though not exceeding 5*l.* And he referred to *Woolley* v. *Cloutman* (*c*), where, under the former act of the 3 *Jac.* 1. *c.* 15. for regulating the same court, excepting actions for *debt* for rent, &c., it was held that an action for use and occupation would not lie there.

The Attorney-General and *Moore*, in support of the rule, observed that the case of the plying porter was held not to be within the act, because he did not seek his

(*a*) 8 *East*, 336. (*b*) 2 *Taunt.* 196. (*c*) *Dougl.* 244.

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livelihood at any particular local ſituation within the juriſdiction, but was equally ready to go elſewhere if ſent; ſo that it was uncertain where he was to be found in order to be ſummoned: none of which reaſons apply to this defendant, who does ſubſtantially ſeek his livelihood at a certain place within the city, where he may at all ſeaſonable hours of buſineſs be found every day. And this differs it alſo from the market-gardener's caſe. Seeking a livelihood is put in contradiſtinction to reſiding, inhabiting, or keeping any houſe, &c. Then the clauſe excepting actions for rent does not apply; for that only refers to caſes where the plaintiff has alſo a remedy by diſtreſs; the words being in the alternative, not to reſtrain any perſon "from making diſtreſs, *or* bringing any "action for rent." But here the defendant's wife boarded and lodged with another, and no diſtreſs could have been made on her.

The Court here inquired under what contract the wife lodged in the houſe; and whether the arbitrator had allowed the plaintiff any thing for rent; which did not ſufficiently appear upon the affidavits: whereupon it was agreed to apply for information as to theſe facts to the arbitrator (Mr. *Warren*) who happened to be in court: and he ſtated that there had been proof before him of a contract for the lodging, and alſo of ſome neceſſaries having been ſupplied: but that as the defendant allowed his wife 10*s*. a week for neceſſaries, which was known to the plaintiff, he (the arbitrator) had only thought proper to allow ſomething over for the rent. On which Lord *Ellenborough* C. J. ſaid that as the arbitrator had allowed ſomething for rent, and there was a count which covered it, the caſe was within the excepting clauſe: in

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which all the Court agreed. But *Le Blanc* J. said that the other general question, (upon which the Court gave no opinion) was of very extensive consequence, and required consideration: for if this were a *seeking a livelihood* in the city within the meaning of the act, it would extend to every banker's and merchant's clerk in *London*, who attended his master's business there in the morning, though his own residence was in another place.

Rule discharged.

Monday, Nov. 26th.

The King *against* Incledon.

If the Court be satisfied that a nuisance indicted is already effectually abated before judgment is prayed upon the indictment, they will not, in their discretion, give judgment to abate it. And they refused to give such judgment upon an indictment for an obstruction in a public highway; which highway, after the conviction of the defendant, was regularly turned by an order of magistrates, and a certificate obtained that the new way was fit for the passage of the public; and on affidavits that so much of the old way indicted as was still retained was freed from all obstruction.

THE defendant was indicted in one count for erecting and continuing, and in another for continuing an obstruction to a public horse and foot road, and was convicted about two years ago at the assizes at *Exeter*, upon its appearing that there had been formerly a public road in the place indicted, though not much used at any time, but which had been altogether shut up for the last 18 years, and been inclosed in part, and laid out in private grounds surrounding the defendant's country seat. Immediately after the conviction took place, the defendant applied to two magistrates of that part of the country for an order to divert the road as a horse and footway, upon setting out another more commodious to the public; which was accordingly done, and the magistrates made the order; but upon application to them afterwards to certify the new way, the prosecutor of the indictment interposed, and stated to them that it had appeared upon the evidence given in support of the indict-

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ment at the assizes, that the old road was not only a horse and foot way but a carriage way, and that he meant to insist on it as a carriage way, and take measures accordingly; upon which the magistrates declined giving the certificate required for the new road, which was only a horse and foot way. The defendant, who was himself a magistrate, then got another magistrate to join with him in certifying the new road: but being soon afterwards satisfied of the irregularity of that proceeding, he abandoned the order already obtained for the diverting of the road, and obtained a new order of two magistrates for diverting the old road as a *highway*, generally; against which order, regularly returned to and filed at the sessions, there was no appeal: and afterwards he obtained a regular order of two magistrates, certifying the new highway to be in sufficient repair. And now

Burrough and *Gifford* (with whom was *Casberd*) on behalf of the prosecutor of the indictment, prayed a judgment by this Court for the prostration of the nusance; which judgment they contended that the Court were bound to give, notwithstanding the subsequent proceedings, and the affidavits of many persons now read on behalf of the defendant, that the particular obstructions complained of which had before been set up in the old road, and which impeded the passage, had been removed after the conviction, and that no obstruction now existed in any part of the old road indicted which was connected with the road as newly set out under the order of the magistrates. And they referred to *The King* v. *Pappeneau* (a), *The King* v. *The Justices of Yorkshire*,

(a) 1 *Stra.* 686.

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shire (*a*), *The King* v. *Stead* (*b*), and other cases cited in those, wherein it was agreed that if the nusance be of a permanent nature, the regular judgment must be to abate it. And here they observed that the indictment charged, the evidence at the trial proved, and the affidavits now read confirmed it to be a continuing and permanent nusance.

Lens Serjt. and *Harris* were for the defendant, but it was not necessary to hear them.

Lord ELLENBOROUGH C. J. The Court will never do any thing in vain: and if they be satisfied, as they are upon these affidavits, that the obstruction indicted has been removed, and that the pnblic have now the free passage of the road which they are entitled to use, we shall not give any judgment of prostration: for it would indeed be nugatory to adjudge that to be prostrated which does no longer exist. What objection can there be to a judgment to this effect; stating that the Court being satisfied that the nusance charged in the indictment was already abated; therefore they gave judgment against the defendant for a nominal fine. And that is the proper thing to be done in this case. If hereafter the prosecutor can question the road indicted to be a carriage road, and not merely a horse and footway; and if he can get rid of the order of justices for turning it as a highway, on which we are not called upon to give any opinion, he will proceed as he may be advised. But the nusance which was indicted having been already removed, and every substantial purpose of justice answered, it is suf-

(*b*) 7 *Term Rep.* 467. (*c*) 8 *Term Rep.* 142.

ficient

ficient for us at present to impose a nominal fine on the defendant for the offence of which he has been convicted.

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Thereupon judgment was given that the defendant pay a fine to the king of 6*s*. 8*d*.

WRIGLESWORTH and Another *against* WRIGHT and STACEY.

Monday, Nov. 26th.

The rule of Court of *H.* 26 *G.* 3., superseding a prisoner, against whom the plaintiff shall not proceed to *trial* or *final judgment* within three terms after declaration delivered, does not attach in a case where there are two defendants, one of whom suffered judgment by default, and the other pleaded to issue; the trial of such issue being had within the third term; though the costs were not taxed, nor final judgment in fact signed till after that term; but then entered, according to the course of the Court, as of that term.

A Rule was obtained on behalf of the defendant *Stacey* for the plaintiffs to shew cause why the writ of inquiry and assessment of damages against him should not be set aside for irregularity, with costs, and why he should not be discharged out of custody, &c. The action was against the defendants as drawers of a bill of exchange, who after putting in bail, upon the arrest, in last *Hilary* term, were served with a declaration and notice to plead on the 31st of *January*, in the same term; and on the next day surrendered themselves in discharge of their bail before justification, and gave notice thereof by the same attorney; from which period they defended separately: and after a fruitless attempt by each to settle with the plaintiffs, pleas were demanded of both the defendants on the 5th of *June*, (the day after *Easter* term) upon which *Wright* pleaded to issue, and entered his plea as of *Hilary* term; but *Stacey* not having pleaded at all, judgment by default was signed against him as of *Hilary* term. The plaintiffs then made up the issue against *Wright* and delivered it with notice of trial, and also with notice to *Stacey* of assessing the damages, at the first sittings at *Westminster* in last *Trinity* term, which was continued to the second sittings in term on the 2d of

 July,

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July, when the cause was tried and the plaintiffs obtained a verdict. A rule for judgment was then given on the 7th, and by mistake another rule for judgment was given on the 13th, which was entered in the rule book as of the 11th, the last day of term: and after four entire days, exclusive of *Sunday*, the costs were taxed on the 19th of *July*, when the plaintiffs signed final judgment. On the 30th the plaintiffs lodged their writ of execution with the marshal, returnable in the present term, when the defendants were completely charged in execution. In *September* the defendant *Stacey* served a judge's summons on the plaintiffs to shew cause why he should not be discharged out of custody on filing common bail; on the the ground that the plaintiffs had not signed final judgment against him in due time: but on hearing the matter, the judge refused to make any order at chambers: whereupon the present rule was obtained. And the question was whether there being two defendants in custody on mesne process in this case, and one of them having suffered judgment by default, the plaintiffs were bound to proceed to final judgment against the one defendant who had suffered judgment by default, within three terms after the declaration delivered, as in the ordinary case of one prisoner; (the proceedings against the other defendant being admitted to be regular:) and here the rule for judgment not having been given till the 13th of *July*, two days after the end of the third term from the delivery of the declaration, though entered as of the 11th, the last day of the term.

Marryat contended that the proceedings were irregular in that respect; and that the plaintiffs might (notwithstanding the pleading to issue of the defendant *Wright*) have

have proceeded to trial and judgment within the three terms.

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WRIGLESWORTH *against* WRIGHT and Another.

Reader, contrà.

Lord ELLENBOROUGH C. J. By the rule of Court (*a*) a plaintiff must proceed to trial or final judgment against a prisoner within three terms after the delivery of the declaration. Now, here the plaintiffs have proceeded within the three terms to the only trial which the course of proceedings enabled them to do; namely, a trial of the issue joined with the other joint defendant, who denied the fact; at which time the damages were also assessed against the other defendant *Stacey*, who had suffered judgment by default; and till that trial they could not have proceeded to tax the costs so as to enter up final judgment against *Stacey*: and such taxation of costs and final judgment were in due time after the trial according to the course of the Court.

Rule discharged (*b*).

(*a*) *Reg. Gen.* of *Hil.* 26 *Geo.* 3. *R.* & *O.* of *B. R.* 39 and vide *Heaton* v. *Whittaker*, 4 *East*, 349., shewing that the trial or *final judgment* spoken of means "final judgment *without trial*."

(*b*) Vide *Pearson* v. *Rawlings*, 1 *East*, 405.

1810.

Tuesday, Nov. 27th.

HOPKINSON *against* HENRY and Another.

If defendant put in special bail within four days in a town cause, he is entitled to plead in abatement, provided such bail be afterwards perfected in time: though he had before put in other bail and given notice of justifying, but had withdrawn them in time.

UPON a rule for setting aside an interlocutory judgment for irregularity, it appeared that the declaration was filed on the 6th of *Nov.*, and notice to plead given in a town cause: on the 7th the defendants gave notice of putting in and justifying bail on the 9th, and on that day they filed a plea in abatement, but did not justify those bail, but put in other bail on the 10th and gave notice of justifying; and the plaintiff excepted on the same day to such second bail; but they justified on the 12th: and on the 19th the plaintiff signed judgment for want of a plea, after demand made of one.

Dampier, on opposing the rule, admitted that in a country cause (*a*), if the defendant put in special bail in time, he might plead in abatement, though they were not justified till after the four days, if they were ultimately perfected in time; for otherwise defendants in country causes would for the most part be ousted of such pleas. But the same reason, he contended, did not extend to town causes; though he also admitted, that there was a note of a case (*b*) where the like indulgence had been extended to a town cause: but he endeavoured to distinguish this case from that, by observing that the failure of perfecting the first bail, which were not excepted to, within the four days, and so completing

(*a*) *Dimsdale* v. *Neilson*, 2 *East*, 406.
(*b*) *Holland* v. *Sladen*, cited in *Binns* v. *Morgan*, 11 *East*, 413.

the

the defendants' right to plead in abatement, was owing to their own laches.

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HOPKINSON *against* HENRY and Another.

But *The Court* said that that made no difference, and made the

Rule absolute.

The KING *against* DOHERTY.

Wednesday, Nov. 8th.

One against whom articles of the peace are exhibited is not entitled to read affidavits on his own behalf, in contradiction of the facts sworn to against him in such articles.

ARTICLES of the peace having been exhibited against the defendant by his wife, process issued thereon to enforce appearance: and when he appeared in court with his sureties on this day, *Marryatt*, on his behalf, tendered affidavits to the court in contradiction of the facts sworn to in the articles, for the purpose of discharging them; contending that as the stat. 21 *Jac.* 1. *c.* 8. requires the causes for which such articles are exhibited to be declared in writing upon oath, and enacts that "if it shall afterwards appear to either of the said courts, (of Chancery or King's Bench,) that the cause expressed in such writing, or any one of them, *be untrue*," the Court may award costs and damages to the party grieved; it necessarily gives them jurisdiction to enquire into the truth of the charge. And though he admitted that affidavits in contradiction of articles of the peace were refused to be received in Lord *Vane*'s case (*a*), as contrary to the practice

(*a*) 2 *Stra.* 1202. The following note of this case from Mr. *Ford*'s MS. is more full.

Lord VANE's Case, *H.* 17 *Geo.* 2.

Where a person exhibits articles of the peace and swears that her

LADY *Vane* exhibited articles of the peace against her husband the Lord *Vane*, propter sævitiam: and in the articles it was charged, that in 1737 a suit was preferred by her in the spiritual court for a separation by reason

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The King against Doherty.

practice of the court on these occasions; yet, he said, that the contrary practice had prevailed in subsequent cases,

life is in danger, the truth of the facts cannot be controverted.

reason of cruelty. That in order to put an end to all differences between her and my lord, articles of agreement were entered into and duly executed, whereby she agreed to return to and cohabit with him; and he covenanted that in case she desired to live separate, he would not molest her. That she accordingly did return and live with my lord; but that upon continuing his cruel usage she was obliged to leave him, and separate herself from him according to the articles. That about *Christmas* 1742 she was seized by five of my lord's servants, and by force carried to his house, and there confined for 11 days; that she afterwards escaped; but that she hath since heard and verily believes that a servant sent by my Lord *Vane* to apprehend her said, that he was ordered by my lord to seize her and bring her home dead or alive: and therefore she swears that she apprehends her life was in danger, and that she was almost always under a continual fear of her life.

There ought to be a reasonable foundation on the face of the articles to induce a fear of personal danger before the Court will require sureties of the peace.

A wife may sue a supplicavit in Chancery against her husband, and to find sureties not to beat or evil intreat her, aliter quam causâ regiminis et castigationis.

Note.—These articles were exhibited in court the last day of *Michaelmas* term 1743; and in *Hilary* term following Lord *Vane* came into court, and moved by his counsel to discharge the articles, because it did not appear on the face of the articles that Lord *Vane* had done any one act to induce his lady to swear the peace against him, or make it necessary for him to give security for keeping the peace. That the husband has a right to seize his wife, to carry her home, and even to confine her if he thought proper. That by the common law he had power to govern, rule, and chastize her reasonably: and although she may sue a supplicavit in Chancery against her husband for cruelty, and to find sureties that he do not beat or evil intreat her; yet even in that case there is a proviso, aliter quam ad virum suum ex causâ regiminis et castigationis uxoris suæ licite rationabiliter pertinet. *F. N B.* 542. (8th edit.) That as to the articles of agreement they were set aside in equity as unconscionable; and a copy of the order was produced; but *the Court* said they could take no notice of it.

The facts stated in the articles are to be considered as true till the contrary appears upon a proper prosecution.

Upon a rule to shew cause, it was answered, and so resolved by *the Court*, that every person was entitled to exhibit articles of the peace for the security of his person, and to allow them was the constant course of the Court as a security against immediate danger. That it was not usual to inquire into the truth or circumstances of the facts charged in the articles, but that the same must be received as true till the contrary appears upon a proper prosecution. That in the present case, taking all these articles together, and that Lord and Lady *Vane* were under an agreement to live separate; that he seized her by force, and confined her 11 days; that he had threatened to seize her again, and ordered her to be brought home dead or alive; it doth appear upon the whole that she had a reasonable foundation to require sureties of the peace against him. Vide *Fitz N. B.* 542. (8th edit.) If the wife be in fear or doubt of the husband

cases, which are referred to from MSS. in 6 *Bac. Abr.* tit. *Surety of the Peace*, G (*a*). The first of these is Sir *T. Allen*'s case (*b*), *H.* 32 *G.* 3. against whom *Parnell* had exhibited articles; but before the recognizance was entered into, *Parnell* presented a petition explanatory of some of the facts sworn to in those articles; on which the defendant's counsel moved to review (*c*) the articles, and read affidavits to contradict the facts therein charged; and the Court granted a rule on *Parnell* to shew cause why the articles should not be reviewed; and being

(*a*) G is printed in the book by mistake for F, there being a subsequent head under letter G.

(*b*) Vide 2 *Burr.* 806. which states the former proceeding, when *Parnell* was brought up to receive judgment upon an indictment for perjury committed in the articles exhibited.

(*c*) Hence it appears, that the affidavits in contradiction of the articles were received upon this new motion to review the articles, arising upon new matter presented to the Court by the articulant, and not by way of opposing the giving sureties of the peace upon the articles in the first instance, which the Court grants upon the prayer of the party applying, quia timet, upon probable cause shewn. The other case, afterwards cited from *Bac. Abr.*, passed without opposition, and also arose upon a a new motion to review the articles.

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band, that he will beat her or kill her, she may sue a supplicavit in Chancery against her husband to find sureties that he do not beat or evil intreat her.

It was likewise said by Sir *John Strange*, that taking this case up upon the articles of agreement only, if Lord *Vane* should force his wife to a cohabitation, she has a right to be relieved; and for that purpose he cited *Lister*'s case, *Trin.* 8 *G.* 1. Captain *Lister*, after articles of separation between him and his wife the Lady *Rawlinson*, seized her by force, and carried her home in order to compel her to live with him. She brought a habeas corpus: and after argument at the bar, it was agreed by *the Court*, that if a wife will make an undue use of her liberty by squandering away her husband's effects, or going into bad company, it was lawful for her husband to lay her under restraint: but where that did not appear, he could not confine her as a prisoner, though even in his own house. And because it appeared in that case that they were parted by consent, and under articles to live separate, *the Court* ordered that she should have her liberty.

Where there are articles of separation between the husband and wife, if the husband afterwards confine her, she may have a hab. corp. and be set at liberty.

Note.—The security of the peace required by the Court in the present case was 1000*l.* for Lord *Vane*, and his bail in 500*l.* each.

finally

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The KING against DOHERTY.

finally satisfied that he had been guilty of perjury, they committed him for that offence, and stayed all proceedings on the articles. The like proceeding took place in another case, there stated, of articles exhibited by *John Brown* against *Hannah Bennett and Others*, *E.* 32 *Geo.* 2., which upon a rule for a review, founded upon affidavits in contradiction, were ordered to be taken off the file.

Lord ELLENBOROUGH C. J., however, (without hearing *The Attorney-General* and *Gurney* for the prosecutrix,) said, that the Court were satisfied that they could not receive affidavits on the part of the defendant to contradict the truth of the articles exhibited against him and prevent his giving surety: they therefore ordered his own recognizance to be taken in 500*l.*, and that of his two sureties in 250*l.* each, for two years. And *Le Blanc* J. referred to the case of *The King* v. *Bringloe and Others*, in *M.* 7 *Geo.* 2. (*a*) when Lord *Hardwicke* presided in this court, where the like determination was made.

(*a*) That case was read from Mr. *Masterman's* MS.—*Prime* moved to discharge articles of the peace, wherein the prosecutrix swore that the defendant *Bringloe* had threatened to do her business: and he offered to read an affidavit of the defendant, wherein he explained the words, and shewed that they did not mean any personal harm to her, but that they related to a law suit then depending between them.

Per Curiam. That the defendant could not by the course of the Court be admitted to controvert the facts: that it never was suffered: and that he could take no other advantage than what arose from any ambiguity in the expression upon the face of the articles. That as for saying he would do her business, it was an ambiguous expression, and was capable of more meanings than one; but that the articles giving them, and charging that the defendant had several times threatened her life, that was a sufficient charge to support the articles; and they advised the defendant to give bail; which he did.—The rest of the note was to another purpose.

1810.

Wednesday, Nov. 28th.

RIDLEY and Another *against* TAYLOR.

If one partner draw or indorse a bill in the partnership firm, it will primâ facie bind the firm; although passed by the one partner to a separate creditor in discharge of his own debt; unless there be evidence of covin between such separate debtor and creditor, or at least of the want of authority, either express or to be implied, in the debtor partner to give the joint security of the firm for his separate debt.

But held that no sufficient circumstance appeared in this case to raise any presumption adverse to the separate creditor taking such joint security, in a case where the bill appeared to have been drawn in the name of the firm to their own order 18 days before the delivery of it to the separate creditor, and to have been accepted and indorsed before such delivery, and to have been drawn for a larger amount than the particular debt; and where, though the indorsement was in fact made by the hand of the debtor partner, yet it did not appear that that fact was known to the separate creditor at the time; and this too in a case where direct evidence might have been given of the covin or want of authority, if it existed.

For the action being brought by the separate creditor against the acceptor, either of the partners might have been called as a witness by the defendant to disprove the authority of the debtor partner to give the joint security: for though if the separate creditor recovered against the acceptor, he would have his remedy over against the firm; yet the innocent partner would have his remedy over against the other. And the bankruptcy of the debtor partner in the mean time does not vary the question of competency.

THE plaintiffs declared in the first count of the declaration upon a bill of exchange, dated the 20th of *October* 1807, drawn by certain persons using the style and firm of *Ord* and *Ewbank* upon the defendant, for 40*l.*, payable to the order of *Ord* and *Ewbank* forty days after date; which bill was stated to have been indorsed by *Ord* and *Ewbank*, and duly accepted by the defendant. There were also counts for goods sold and delivered, and the common money counts. The defendant pleaded non assumpsit; and at the trial before *Wood* B. at *Durham* in 1809, a verdict was found for the plaintiffs for the amount of the bill, subject to the opinion of the Court on the following case:

The plaintiffs in *November* 1806 sold and delivered to *J. Ewbank*, (who together with *Ord* then, and subsequent to the transactions hereafter mentioned, carried on trade as linen-drapers, under the firm of *Ord* and *Ewbank*,) on his separate account, a cargo of coals to the amount of 34*l.* 11*s.* On the 9th of *May* following the plaintiffs received from *Ewbank* 5*l.* on account, and on the 27th of the same month, his promissory note for 29*l.* 9*s.* 5*d.*, which after allowing 1*s.* 6*d.* for the stamp constituted the

 balance.

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RIDLEY *against* TAYLOR.

balance. This note being dishonoured, the plaintiffs were obliged to and did take it up on the 2d of *November* 1807. On the 7th of the same month *Ewbank* gave to the plaintiffs the bill in question, in payment and discharge of his, *Ewbank*'s, said debt. This bill was drawn and indorsed by *Ewbank* in the style and firm of *Ord* and *Ewbank*, and was before that time accepted by the defendant. "*Ord* and *Ewbank*" is the usual firm of that partnership. A few days after *Ewbank* had delivered this acceptance to the plaintiffs, he applied to them for the balance of 9*l.* 19*s.* 9*d.*; but the plaintiffs refused to pay it until the bill upon the defendant should have been paid. The plaintiffs negotiated the bill for 40*l.*, and were in consequence of its being dishonoured, although duly presented for payment to the defendant, ultimately obliged to pay and have actually paid the amount thereof and the charges of noting the same: and they thereupon debited *Ewbank* alone for the same in their account with him; having before credited his said account with them for the amount of that bill. *Ord* and *Ewbank* have since become bankrupts. The question was, Whether the plaintiffs were entitled to recover? If they were, the verdict was to stand: if not, a nonsuit was to be entered.

Hullock, for the plaintiffs, stated the question to be, whether one partner could draw or indorse a bill in the partnership firm for his own debt, in favour of a third person, to whom no fraud or knowledge of the drawer's want of authority from his partner was imputed: and and whether this could be questioned by the acceptor of the bill in an action brought against him by the payees? He relied on *Swan and Others* v. *Steele and Others* (*a*), as

(*a*) 7 *East*, 210.

in

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in point: where an indorſement of a bill by two partners, in the partnerſhip firm, for their ſeparate debt, was held to bind a third partner who was engaged with them under the ſame general firm in another buſineſs, in the courſe of which ſuch bill was received by them; the indorſees and ſeparate creditors of the two not knowing of the miſapplication of the tri-partnerſhip fund at the time. The only difference (merely nominal) between the caſes is, that there the ſeparate creditors did not know at the time of the exiſtence of a third partner, whoſe name did not appear in the firm; and here they did not know that the other partner did not conſent to this application of the partnerſhip credit. There might be good reaſon for ſuch conſent; as to ſave the credit of one of the houſe. If one of ſeveral country bankers paid his own debt in the notes of the houſe, as would probably be the caſe in moſt inſtances, where the notes of ſuch a houſe were in circulation, it would be extremely inconvenient if the creditor were obliged to go round to all the partners to know whether they aſſented to it. In the preſent inſtance it does not appear, that in the ſettlement of the partnerſhip accounts and the diſtribution of the profits between them, this bill did not become the particular property of *Ewbank*. The Court will never preſume colluſion or fraud, where none is found, unleſs in caſes where the law preſumes fraud.

Holroyd, contrà. The law does not imply an authority in individual partners over the joint fund, except in matters which affect the partnerſhip concerns. Thus far only the law gives effect to ſuch a general authority, that where one partner has for his own purpoſe diſpoſed of the effects or paſſed negotiable ſecurities on the credit

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Ridley *against* Taylor.

of the partnership, which have gone out into the world, it shall bind all the partners in the hands of innocent third persons having no knowledge of the real transaction, because they would have a right to presume that he acted with the authority of his partners; but that will not extend to protect the original takers of such property, knowing that it was issued for his separate debt. Now here, the action is not brought by third persons to whom the bill was indorsed without notice, but by the separate creditors of *Ewbank* themselves, who must have known that he was pledging the partnership funds for his own debt, and who were therefore bound to inform themselves that he had a special authority so to do. In the case of one of several partners in a country bank paying his own debt with the notes of the bank, which were in common circulation, the creditor receiving such notes could not tell whether they might not have been before circulated and have come back into the partner's hand, as his individual property; and then perhaps it would be necessary to fix the creditor with knowledge to the contrary: or at any rate if he passed them off to others, who had no notice, they would be entitled to recover against all the partners; and so no public inconvenience could ensue. But where a creditor of one partner takes a particular security for his separate debt upon the partnership fund, he must know that his debtor is paying his debt with the money of [illegible] therefore he takes it at his peril, if it should [illegible] the event that the debtor had no authority to [illegible] partner for that purpose. It is the same between [illegible] as if the debtor had pledged the fund of a stranger for his own debt, on his own assertion, that he had authority to do so: if he had such authority the pledge would be good; but the creditor would take it at the

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the peril of proving that authority if it were afterwards denied. Here the bill was accepted by the defendant before it was indorsed; and the indorsement, though in the name of *Ord* and *Ewbank*, was made by *Ewbank* alone, and therefore the plaintiffs must stand upon his single authority. The defendant, when he accepted the bill, must have presumed that it was drawn on the joint account; but now, having notice that *Ewbank* had no authority from *Ord* to indorse it, the latter may well defend himself, through the defendant, against the plaintiffs, who knew that it had been passed by *Ewbank* on his private account: for if the plaintiffs recover against the defendant, he will be entitled to recover over against *Ord* and *Ewbank*; and therefore the question is the same as if they had sued *Ord* and *Ewbank* in the first instance. In *Arden* v. *Sharpe and Gilson* (a), where the plaintiff discounted a bill brought to him by *Gilson*, who desired that the business might be kept secret from his partner *Sharpe*, but indorsed it in the name of *Sharpe* and *Gilson*; Lord *Kenyon* held, that the action on the bill would not lie; for the transaction indicated that the money was for *Gilson*'s own use, and not on the partnership account; and therefore that the plaintiff should not be allowed to resort to the security of the partnership. The same principle was established in *Wells* v. *Masterman and Gilson* (b), where Lord *Kenyon* said, that if a man have dealings with one partner only, and he draw a bill on the partnership on account of those dealings, he is guilty of a fraud, and in his hands the acceptance made by that partner will be void; but it would be otherwise in the case of a bona fide indorsee. *Abel* v. *Sutton* (c) recognized the same principle, which

(a) 2 *Esp. N. P. Cas.* 524. (b) *Ib.* 730.
(c) 3 *Esp. N. P. Cas.* 108.

 was

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was again confirmed by the whole Court in *Shirreff and Another* v. *Wilkes and Others* (*d*). There two of three partners, having contracted a debt to the plaintiffs before the admiſſion of the third partner into the firm, afterwards accepted in the firm of the three, but without the aſſent of the new partner, a bill drawn upon the new firm by the plaintiffs: and the ſecurity was held fraudulent and void as againſt the third partner. Lord *Kenyon* there relied on the aſſent of the third partner not having been found, and there being nothing ſtated to ſhew that he had any knowledge of the tranſaction. And *Lawrence* J. obſerved, that the plaintiffs declared as upon a promiſe by three defendants; and conſequently, to entitle themſelves to recover muſt prove a promiſe either expreſs or implied binding upon all the three: in which they had failed, and therefore there muſt be judgment againſt them. The caſe of Mr. *Fordyce* was alſo there referred to as of the ſame deſcription; which was decided on the ground of covin or groſs negligence on the part of the ſeparate creditor taking the joint ſecurity. [Lord *Ellenborough* C. J. One partner pledging the guarantie of the firm for his ſeparate debts, is a very different caſe from that of drawing or [illegible]ſing bills in the partnerſhip firm: the one authority is not nece[illegible]ry or uſual for carrying on the concerns of the houſe; [illegible]. The only queſtion here is, whether the plaintiffs had ſuch notice that the bill was indorſed [illegible] without the authority of the other, as to take the caſe out of the general rule. *Le Blanc* J. It does not appear that the plaintiffs knew that *Ewbank* was the partner who in fact indorſed the bill.] It would be the ſame if done by a clerk in the houſe: the plain-

(*d*) 1 *Eaſt*, 48.

tiffs

tiffs taking a joint security, knowing that it was for a separate debt, must take it at the peril of proving the authority of the one to pledge the other's credit for his personal debt. As to *Swan* v. *Steele*, the indorsement was made in the firm common to both the houses of trade; and the creditor did not know, at the time he received the bill, that the indorsement would bind any other than the persons who were his debtors: and that distinguishes it from the present case.

Hullock in reply contended that the onus probandi lay upon the defendant in this case to shew that *Ewbank* had not the authority of *Ord* to pledge his credit by the indorsement in the partnership firm; it being within the scope of a trading partner's general authority to draw, accept, and indorse bills of exchange in the partnership firm; without the necessity of the creditor's inquiring whether the particular partner had such authority. The cases cited on the other side must have gone on the ground that the want of authority was indicated by the circumstances of the case; for they recognize the general principle, that one partner may bind another by such securities given in their joint names.

Lord ELLENBOROUGH C. J. Primâ facie one partner is bound by the indorsement of another in the partnership firm; but that presumption may be [illegible] by shewing collusion: but the difficulty of the case is that we have not the facts sufficiently before us, to [illegible] that collusion.

Holroyd observed that the defendant could not have called *Ord* as a witness to negative the authority of *Ewbank*

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bank to indorfe the bill for his own debt; becaufe, if the plaintiffs recovered againft *Taylor*, he would have his remedy over againft *Ord*. But *Bayley* J. faid that *Ord* would in that cafe have his remedy over againft *Ewbank*; and therefore would ftand indifferent. *Holroyd* fuggefted a doubt on the ground of *Ewbank's* bankruptcy: but Lord *Ellenborough* C. J. obferved that the bankruptcy could make no difference on that queftion.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court:

This was an action by *Ridley* and *Knaggs*, the plaintiffs, upon a bill of exchange, drawn by *Ord* and *Ewbank* on the defendant, payable to their own order, and by them indorfed to the plaintiffs, and accepted by the defendant. [Then, after ftating the cafe, his Lordfhip proceeded—] If this were diftinctly the cafe of a pledging by one partner of a partnerfhip fecurity for his own feparate debt without the authority of the other partner; or if there exifted in this cafe *evident covin* between one partner and the holder of the partnerfhip fecurity, upon which the action is brought, in order to charge the other partner without his knowledge or confent, either exprefs or implied, for the private advantage of the parties to fuch covinous agreement; we fhould have no hefitation to pronounce a bill, drawn and indorfed under fuch circumftances, void in the hands of the covinous holders, upon the principle laid down in the cafe of *Sheriff and Another* v. *Wilks and Others*, 1 *Eaft*, 48. But upon the facts ftated, fuch does not diftinctly appear to us to be the cafe. Nor does it appear that there was any fuch *craffa negligentia* on the part of the plaintiffs, in

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not inquiring whether *Ewbank*, the one partner with whom they dealt, was authorized to dispose of this security (which had originally been partnership property) as his own, as to render this transaction on that account fraudulent, and therefore void. In the case of *Sheriff and Another* v. *Wilks and Others*, the plaintiffs drew for a balance due from *Bishop* and *Wilks* for porter sold to them, exclusively of their third partner *Robson*; and then they sought to charge *Robson*, as well as *Bishop* and *Wilks*, by the acceptance of *Bishop* in the partnership firm of *G. Bishop* and Co. In that case, if the plaintiffs meant their bill, which was drawn *generally* on *G. Bishop* and Co. as a bill upon the *three* partners, (and Lord *Kenyon* clearly so considered it,) they must have been conscious that it was an unauthorized act in them to draw on the partnership firm and funds of the *three* for the separate debt of *two*: and they must have been fully aware that the third partner *Robson* was at the time ignorant that they had so done. And if they did not mean to draw upon the three, but upon *Bishop* and *Wilks* only, what right could they have to apply a *general* acceptance, in the name of *Geo. Bishop* and Co., to charge *Robson*, where there was no reason to suppose that *Robson* had consented that his security should be pledged? That case, therefore, presented circumstances from which, in the attempt to charge *Robson*, covin to the prejudice of the third partner might fairly be inferred. In that case too, *Robson*, *Wilks*, and *Bishop* (the only persons likely to know whether *Robson*'s security were intended to be pledged, and whether he had consented that it should be pledged) were made parties to the suit; so that none of them could in that suit be called as witnesses. The case, therefore, hardly admitted of *positive evidence* as to these

points

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points, and the Court could have nothing whereupon to act, but *presumption*. In the present case so strong an inference of covin does not arise: *Ord* and *Ewbank* would have been competent witnesses for the defendant in the case: positive evidence, therefore, upon the point of covin, if there really were any, might have been adduced. This bill had an existence, according to its apparent date, 18 days before the time of its delivery to the plaintiffs: it was drawn for a sum considerably exceeding the debt; and was not only drawn and indorsed, but accepted also, before it was produced to them; and although it is stated in the case, that in fact the bill was drawn and indorsed *by Ewbank* in the partnership firm, it does not appear that the plaintiffs knew that it was drawn and indorsed by *him*. Under these circumstances, it might reasonably be supposed, by the party to whom it was given, to be a partnership security, of which *Ewbank*, the partner in possession of it, had for for some valuable consideration, or in virtue of some arrangement with *Ord* the other partner, become the proprietor, so as to be authorized to deal with it as his own. At any rate the contrary does not either actually or presumptively appear. And it seems to us, in order to deprive the plaintiffs of the benefit of such a security in a case which admits of positive proof to the contrary, that the contrary should appear: and that either actual covin should be shewn, or that at least more pregnant evidence to induce that conclusion should have been given on the part of the defendant than is disclosed upon the face of this case. All that appears here is, that a partnership security was applied by the one partner, *Ewbank*, in satisfaction of his separate debt; without shewing that such application was at the time unknown to or unautho-

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authorized by the other partner *Ord*; as, by the evidence of either *Ewbank* or *Ord*, it was in this case competent to the defendant in point of law to have done; and without laying before the Court any other evidence, from which the same conclusion ought to be drawn. In the absence, therefore, of any evidence, to shew that the delivery of this bill to the plaintiffs was covinous, in a case where positive evidence of the covin might have been given, had covin really existed, the Court feels itself obliged to give effect to the transfer of the bill, and to say that the defendant, who relied upon covin as his defence, has not satisfactorily established such covin. It is therefore our duty to direct, that the verdict which has been given for the plaintiffs in this case should stand, to the extent of the debt due from *Ewbank* to the plaintiffs; but it ought to be reduced to that sum (*a*).

(*a*) Vide *Pinkney* v. *Hall*, *Salk.* 126. and *Carvick* v. *Vickery*, *B. R. H.* 23 *G.* 3. *Dougl.* 653. n.

NICHOLS *against* BOZON.

Wednesday, *Nov.* 28th.

Where a nonsuit is set aside *upon payment of costs*, such payment is made a condition precedent to the setting aside the nonsuit; and without it, the plaintiff cannot proceed to another trial.

THE first time this cause went to trial, which was at the sittings after last *Hilary* term, the plaintiff was nonsuited: and upon application to this Court in the ensuing term, that nonsuit was set aside *upon payment of the costs thereof*; and the venue was changed into *Devonshire*. These costs were taxed by the Master at 67*l*. 18*s*. which were demanded of but never paid by the plaintiff; notwithstanding which, having changed her attorney, she gave notice of trial for the last *Summer* assizes at *Exeter*, and entered her cause for trial; though warned by the defendant that he should consider such notice and trial as a

nullity

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nullity, for want of payment of the prior cofts taxed; the nonfuit having been only fet afide conditionally, *upon payment of the cofts*. In confequence of which the defendant, after repeating his objections at the trial, declined to defend the caufe, and the plaintiff recovered a verdict upon the cafe which fhe proved.

In this term therefore *Jekyll* and *Dampier* obtained a rule upon the plaintiff to fhew caufe why the verdict fo obtained by her fhould not be fet afide for irregularity, with cofts, together with the cofts of the application, to be paid by the plaintiff's now attorney: and why, unlefs 67*l.* 18*s.*, the cofts taxed by the Mafter on the former rule obtained by the plaintiff for fetting afide the nonfuit, &c. were paid within ten days to the defendant, the faid rule fhould not be difcharged, and the defendant be at liberty to fign his judgment of nonfuit, and tax his cofts thereupon.

The Attorney-General and *Moore*, on oppofing the rule, relied chiefly on the merits of the plaintiffs's cafe; but alfo obferved that there was no time mentioned in the rule for fetting afide the nonfuit for the payment of the cofts: and the judge thought that he was bound to try the caufe.

Lord ELLENBOROUGH C. J. We cannot enter now into the merits. The nonfuit at the firft trial was only ordered by the Court to be fet afide *upon payment of cofts*; the payment therefore of thofe cofts when taxed was a condition precedent to the plaintiff's proceeding to another trial: and if they have not been paid we cannot help her.

Per Curiam, Rule abfolute.

SMITH and Others *against* BECKET (a).

Saturday, Nov. 10th.

Where the defendant lent his indorsement on a promissory note to the drawer, which note was payable on demand, for the purpose of enabling him to raise money on that security from the plaintiffs, his bankers, who agreed to make advances thereon for six months; held that the bankers, who had renewed their advances at the end of the six months without the knowledge or consent of the defendant, could not recover upon the note thus indorsed by him, without proof of a demand on the drawer and a regular notice of the dishonor to the defendant.

THIS was an action on a promissory note for 200*l.*, dated 28th *October* 1809, made by *Henry Canning*, payable on demand to the defendant or order, and by him indorsed. After the indorsement the note was delivered back to *Canning*, with others in the same form, to enable *Canning* to obtain credit with the plaintiffs, his bankers, by the deposit of the notes. *Canning* had then lately stopped payment, and was about to enter into trade again, which was well known to all the parties. Upon the deposit of the notes, the plaintiffs made advances to him to more than the amount of the notes; which advances were made for 6 months, and were afterwards renewed without any communication to the defendant. *Canning* became bankrupt on the 28th of *May* 1810; and upon such bankruptcy the plaintiffs wrote to the defendant to demand payment of the notes. Upon the 5th of *June* a formal demand was made upon *Canning* by the plaintiffs, and a writ was sued out by them against the defendant upon the following day, without giving him notice of such demand and non-payment. At the trial before Lord *Ellenborough* C. J. at *Guildhall*, his Lordship was of opinion that such notice was necessary, and nonsuited the plaintiffs.

Taddy moved for a new trial, and contended that under the circumstances of the case no notice was necessary.

(a) This case was decided within the first four days of the term, when I was not in court, and was communicated to me by a gentleman at the bar, who was engaged in it.

That

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SMITH and Others *against* BECKET.

That the bankruptcy of *Canning* was perfectly known to all the parties: that his preceding insolvency was the very basis of the transaction and the reason of the deposit; that none of the parties looked to him: and as no value had been given for the note, it fell within the exception as to notice established by the case of *Bickerdike* v. *Bollman* (a). That the case of *De Berdt* v. *Atkinson* (b) was expressly in point, in which Ld. C. J. *Eyre* says, "General rules are established for general convenience; and I agree, that if the drawer be not known to be insolvent, the act of insolvency will not excuse the want of an early demand; but the fact of knowledge excludes all the presumptions that would otherwise arise. Then as to notice and the application for payment to the defendant; what did it signify to him when that application was made: it could make no difference to him whether it were made on one day or another: he meant to guaranty the payment of the note, and there was no possibility of any loss happening to him from the want of notice. In this instance therefore the general rule fails in its application." The case of *Nicholson* v. *Gouthit* (c), he observed, was very distinguishable; for there it was stated that if the bill had been presented when due, it would have been paid; as the defendant had a fund in his hands at that time for the payment of the bill, which was afterwards withdrawn when it appeared that the bill had not been presented.

The Court, however, held that notice was necessary under the circumstances of this case, and that the plaintiffs were not entitled to recover, particularly as it ap-

(a) 1 *Term Rep.* 405. (b) 2 *H. Blac.* 336. (c) 2 *H. Blac.* 609.

peared

peared that there had been a renewal of the advance made by them to *Canning*, without any communication of it to the defendant: and at the last, if notice had been given by the plaintiffs to the defendant, that they would not trust *Canning* any longer, the defendant might have taken measures for his own security.

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SMITH and Others *against* BECKET.

Rule refused.

The KING *against* HARE (a).

July 10th.

Affidavits not intitled *in the King's Bench*, and sworn before *A. B., a commissioner*, &c. without stating him to be a commissioner *of this Court*, cannot be read: but those *sworn in court*, or *before a Judge of the court*, though not intitled *in the King's Bench*, may be read.

CLARKE on a former day obtained a rule to shew cause why a writ of mandamus should not issue directed to *Edward Hare*, the sole commissioner under a drainage act in *Lincolnshire*, commanding him to make a rate for reimbursing Messrs. *Ellison*, lessees of the *Fosdike* navigation, a sum expended by them in repairing the bank and works adjoining the said river.

The Attorney-General, for Mr. *Hare*, now objected that the affidavits upon which the rule was drawn up could not be read, as they were not intitled *in the Court*, nor appeared to be sworn before *a commissioner of the Court*. On inspecting the affidavits none of them appeared to be intitled "*In the King's Bench*:" one was sworn in court, and another before Mr. Justice *Bayley*; both which the Court determined might be read: but the other three being sworn before "*Charles Hayward, a commissioner, &c.*" without stating that he was a commissioner *in this Court*; and the other two not being sufficient to sustain the rule, they directed it to be discharged; after referring to the case of *The Kennet and Avon Canal Company* v. *Jones*, 7 *Term Rep.* 451.

(a) This case was decided in *Trinity* term 50 *Geo.* 3., at a time when I was not in court; and I was favoured with this note of it by Mr. *Dealtry*.

1810.

July 11th.

The King *against* Wakefield (*a*).

An insolvent debtor may be brought up after the ordinary time allowed, on affidavit of his ignorance of the creditor's place of abode till recently before his application, within the saving clause of the stat. 33 *G.* 3. *c.* 5. *s.* 5.

One convicted upon an indictment for an assault, who, upon reference to the king's coroner and attorney, was directed by his award to pay so much for *costs* and so much for *compensation* to the prosecutrix, is entitled to be discharged as an insolvent debtor under the lord's act 32 *Geo.* 2. *c.* 28. without the aid of the stat 33 *Geo.* 3. *c.* 5.

THE defendant had been convicted upon an indictment for a violent assault; and when he came up for judgment, the matters in difference were referred to the king's coroner and attorney, who awarded the defendant to pay 59*l.* 14*s.* 9*d.* for costs, and 40*l.* 5*s.* 3*d.* for compensation to the prosecutrix. And the defendant being in custody, charged upon an attachment returnable in last *Michaelmas* term for non-payment of these sums, applied on a former day in this term for a rule to be brought up as an insolvent debtor; and produced an affidavit, that he did not apply sooner, owing to his total ignorance of the place of the prosecutrix's abode from the commencement of the prosecution to the present time, although he had used all due diligence to obtain the same.

Le Blanc J. (the only Judge in court) was of opinion that this was a case of omission arising from ignorance, within the meaning of the statute 33 *G.* 3. *c.* 5. *s.* 5. and directed the proper officer of the court to enter a rule to bring up the defendant as an insolvent debtor; which was accordingly done.

The defendant was thereupon brought up two days ago before Mr. Justice *Grose*; when it was objected by *Nolan*, on behalf of the prosecutrix, that this was not an attachment for non-payment of *costs only*, and therefore not within the stat. 33 *G.* 3. *c.* 5. *s.* 4. But

(*a*) This case was decided in last *Trinity* term, when I was not in court; and I was favoured with this note of it by Mr. *Dealtry*.

Grose J.

GROSE J., upon referring to the case of *The King* v. *Stokes*, in *Cowper*, 136. was of opinion that the defendant was entitled to the benefit of the insolvent debtors' act; but remanded him till the last day of the term to give the prosecutrix an opportunity of inquiring into his schedule. He was now brought up again, and the objection was repeated before

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THE KING *against* WAKEFIELD.

LE BLANC J., who was of opinion that the defendant's case was within the Lords' Act of the 32 *Geo.* 2. and did not want the aid of the 33 *Geo.* 3. *c.* 5. And the defendant took the oath of an insolvent debtor; but was remanded upon a note given by the prosecutrix.

THORNTON *against* WILLIAMSON (a).

Saturday, July 8th.

Trespass for breaking and entering the plaintiff's messuage and yard, and passing and repassing therein; plea 1st, not guilty as to the force and arms, &c.; and, 2dly, as to the residue, a justification of a right of way over the locus in quo *at all times*; and, 3dly, a like justification *in the day time*. Replication, taking issues on the two rights of way, and new assigning extra viam, &c. to which there was judgment by default: and after verdict for the plaintiff on the first special issue for 1s., and damages assessed also on the new assignment, and *a verdict for the defendant* on the not guilty, except, &c *and on the second special issue*; held that the defendant was entitled to the general costs of the trial; because the plaintiff was not obliged to go to trial, but should have let judgment go by default, on the issue upon the limited right of way, which was found against him.

THE declaration was in trespass for breaking and entering on divers days the plaintiff's messuage, yard, and passage, and passing and repassing therein, and making openings and door-ways in the walls of the said premises, &c. The defendant as to the force and arms, &c. and making the openings and door-ways, &c. pleaded not guilty: and as to the residue of the trespass, he pleaded,

(a) This case, which I only partly heard, was decided in last *Trinity* term, after I had left the court; but the papers and notes were communicated to me by a gentleman at the bar engaged in it.

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pleaded, first, that before the making of the indentures of lease and release after-mentioned, *J. B.* and *T. L.* were seised in fee, as well of the said yard and passage, as of a house and small yard adjoining; and that for 30 years before the alienation of the said messuage and yard the occupiers thereof had a right of way from a public street in *Shrewsbury* into and along the said yard and passage through a door in the wall of the small yard *at all times*, for the convenient use and occupation of the said messuage and yard: and that *J. B.* and *T. L.* by lease and release, before the trespass complained of, conveyed, &c. to the defendant, with all paths, passages, &c.; in right of which the defendant claimed the way *at all times*. 2dly, The defendant pleaded a like claim of way *in the day-time only*. The replications took issues on these rights of way, and new assigned that the defendant broke and entered, &c. and passed and repassed, &c. at other times and for different purposes than those in the pleas mentioned, and out of the supposed ways: and to the new assignment, the defendant suffered judgment by default. At the trial of the issues the defendant admitted the trespass by night as well as by day, and also that he had passed up and down the yard through a lower door in his house, to which it was admitted that he had no right of entrance; and for which nominal damages were assessed on the new assignment; and a verdict was also taken for the plaintiff on the first special plea with 1*s.* damages and 40*s.* costs; and for the defendant on the not guilty except, &c. and also on the second special plea, upon his right of way claimed *in the day-time*.

The Master having allowed the plaintiff the general costs of the trial, a rule nisi was obtained for reviewing the

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the taxation; which was opposed by *Puller*, who relied on the stat. 4 & 5 *Ann. c.* 16.; which, after allowing a defendant to plead as many several matters as he shall think necessary for his defence, provides that if a verdict be found *on any issue* in the said cause *for the plaintiff*, costs shall be given to him at the discretion of the Court, unless the Judge who tried the cause shall certify that the defendant had a probable cause to plead the matter which upon the said issue shall be found against him. Here the plaintiff was obliged to go to trial upon the issue on the first special plea, or to admit a right of way for the defendant *at all times*, to which he was found not to be entitled, but only to a right of way in the *day-time*, as claimed by his second special plea: the plaintiff was therefore entitled within the words and meaning of the statute to the costs of the trial. If the defendant had only claimed a right of way in the day-time, as stated in the second special plea, upon which he succeeded, then he would have been entitled to the costs of the trial. The cases referred to and commented upon were *Brooke* v. *Willet* (*a*), *Day* v. *Hanks* (*b*); *Griffiths* v. *Davis* (*c*), [in which latter *all* the *issues* were found for the defendant, who was therefore entitled to the costs of the trial of those issues, though damages were at the same time assessed for the plaintiff upon a new assignment to which there was judgment by default;] and *Postan* v. *Stanway* (*d*).

(*a*) 2 *H. Blac.* 435.

(*b*) 3 *Term Rep.* 654. The same point which was ruled in *Day* v. *Hanks* was also ruled in another case of *Wright*, *Clerk*, v. *Smithies*, T. 49 *Geo.* 3. *B. R.*, with this difference only, that the two distinct causes of action, which in the former case were stated in two counts, were in the latter case comprised in one count.

(*c*) 8 *Term Rep.* 466. (*d*) 5 *Esp.* 261.

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Abbott, contrà, was asked by the Court (*e*) how the plaintiff could have avoided going down to trial, when the plea claiming a right of way for the defendant at all times, that is by night as well as by day, was put upon the record. To which he answered, that the plaintiff should have let judgment go by default on the plea claiming a right of way only in the day-time; and then if the cause had gone to trial only on the issue as to the general right of way claimed by the defendant at all times, the plaintiff succeeding on that issue would have been entitled to the general costs of the trial.

The Court were satisfied with that answer, and made the rule absolute for the Master to review his taxation (*a*).

(*e*) Lord *Ellenborough* C. J. had left the court at this time.

(*a*) This case differs from *Martin* v. *Vallance*, 1 *East*, 350., where to trespass quare clausum fregit, the defendant pleaded not guilty, and also a justification of a right of way; and the plaintiff traversed the right of way, and new assigned extra viam; *and issue was taken*, as well *on the new assignment*, as on the right of way: there, after verdict for the plaintiff, with 1*s.* damages on the new assignment, and for the defendant on the justification, the plaintiff was held entitled to full costs; deducting only the defendant's costs on the issue found for him.

The Case of the HOTTENTOT VENUS.

Saturday, Nov. 24th.

A FEMALE native of *South Africa*, remarkable for the formation of her person, was exhibited in *London* in the course of the autumn of this year under the name of the *Hottentot Venus* (her real name being *Saartje Baartman*) by certain persons who had the apparent custody of her, and who received money for such exhibition. The decency of the exhibition was not called in question; it appearing that the woman had proper cloathing adapted to the occasion; but from some expressions which had been uttered by those who had brought her over to this country, and with whom she continued, and some apparent indications of reluctance on her part during her exhibition, there was reason to believe, and affidavits were accordingly laid before the Court to that effect, by the secretary of a society, denominated the *African* Institution, that she had been clandestinely inveigled from the *Cape of Good Hope*, without the knowledge of the *British* governor, (who extends his peculiar protection in nature of a guardian over the *Hottentot* nation under his government, by reason of their general imbecile state;) and that she was brought to this country and since kept in custody and exhibited here against her consent. Whereupon the Court, on the motion of Mr. *Attorney-General*, granted the following rule.

The Court, upon affidavit laid before them, suggesting probable cause to believe that a helpless and ignorant foreigner was brought into this country, and exhibited for money, against her consent, by those in whose keeping she was, granted a rule upon her keepers to shew cause why a writ of habeas corpus should not issue to bring her before the Court, and directed an examination to be taken of her in the mean time before the coroner and attorney of the court, in the presence of proper persons deputed by the persons applying for the writ, and by those against whom it was prayed.

England.—Upon reading the several affidavits of *Zachary Macaulay* and others, and *William Bullock*, it is ordered, that *Tuesday* next be given to *Alexander Dunlop* and *Henrick Cæsar*, to shew cause why a writ of habeas

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The Case of the HOTTENTOT VENUS.

habeas corpus should not issue directed to them, commanding them to have the body of a certain native of *South Africa*, denominated the *Hottentot Venus*, before this court immediately, to undergo, &c. Upon notice of this rule to be given to them in the mean time. And it is further ordered, that one or two such person or persons as shall be approved for that purpose by the coroner and attorney of this court shall, at such times as shall be appointed by the said coroner and attorney, have free access to the said native of *South Africa* at the house of the said *Alexander Dunlop* and *Henrick Cæsar*, in *York-street*, *Piccadilly*, in the absence of the said *Alexander Dunlop* and *Henrick Cæsar*, but in the presence of one or two such person or persons as shall be nominated by them, and to be approved of by the said coroner and attorney for the purpose of conversing with her.

Such examination took place accordingly before the coroner and attorney of this court, who made his report thereof; from whence it satisfactorily appeared to the Court that the woman came over here, and was exhibited, by her own consent, upon a contract to receive a certain proportion of the profits arising from the exhibition of herself: and this being confirmed by affidavits made by those who had the care of her; *the Court*, whose authority as guardian of the personal liberty of the subject was alone called into action on this occasion, finally discharged the rule.

Gaselee appeared on behalf of the persons against whom the writ was prayed.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Fifty-first Year of the Reign of GEORGE III.

1811.

MAY and Another, Assignees of TAYLOR, a Bankrupt, against HARVEY.

Thursday, Jan. 24th.

If a thing be deposited by one, with the authority of another, and received by the bailee, to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. But where it only appeared that it had been agreed between the assignor and the assignee of a lease, that, to save the expence of a counterpart, it should be deposited in the hands of a third person, and the assignee afterwards delivered it to the bailee to keep, but without mentioning that it was on the joint account, and no communication was made of the deposit to the assignor, who never interfered further in the matter; but the defendant afterwards (with the privity of the bailee who acted as his agent) procured an illegal and void conveyance of the property in it from the assignee: held that the assignee or his legal representatives might alone maintain trover for it, after demand and refusal.

IN trover for a lease and assignment, which was tried before the Lord Chief Baron in *Essex*, the case appeared to be this. The defendant was a creditor of *Taylor* before and at the time of his bankruptcy. On the 4th of *November* 1809 *Taylor* committed an act of bankruptcy by assigning all his goods and effects to one *Carter*, another creditor, by whom he was pressed for his debt: and this was known to the defendant in the *De-*

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cember following, who alfo preffed *Taylor* for a fecurity, and propofed that he fhould affign the leafe in queftion to him (being a leafe of a meffuage, &c. occupied by *Taylor*,) which had been before depofited by *Taylor* in the hands of the defendant's fon, who it appeared acted throughout this tranfaction under the defendant's direction and as his agent. *Taylor* did accordingly fome little time before *Chriftmas* execute an affignment of the leafe, which had been prepared by order of the defendant, antedated the 2d of *November* preceding: and foon afterwards the commiffion of bankrupt iffued againft *Taylor*. It further appeared that the leafe had been originally affigned to *Taylor* by one *Bridge*; and to fave the expence of a counterpart, *Taylor*, who was examined as a witnefs at the trial, faid that it had been agreed by him and *Bridge* that the leafe fhould remain for both of them in the hands of the defendant's fon: but it did not appear that this agreement was communicated by *Taylor* to the fon at the time when the leafe was depofited with him; and when, after the commiffion iffued, the leafe was demanded of the defendant by order of the affignees, he made no objection that it had been depofited by the joint authority of *Bridge* and *Taylor*, but faid that it was in the poffeffion of his fon, whom he had directed to keep it as a fecurity for his, the defendant's, debt, in virtue of the affignment executed and bearing date on the 2d of *November* preceding: and for this reafon alone alfo the fon refufed to part with it when applied to for that purpofe. It was objected at the trial that the confent of *Bridge* to the delivery up of the leafe was not proved, without which the plaintiffs were not entitled to recover, as it had been originally depofited by the authority of both: but his Lordfhip overruled the objection; confidering that this had not been relied upon by the defendant; but on the contrary that he had claimed

the

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the beneficial intereſt in the leaſe by the aſſignment from *Taylor*, which the jury believed to be antedated; and that it was inconſiſtent that the defendant ſhould inſiſt on the benefit of that aſſignment, and at the ſame time defend his poſſeſſion as being the depoſitory of another. The plaintiffs accordingly obtained a verdict: which *Adolphus* moved, and obtained, a rule niſi in the laſt term (*a*), to ſet aſide and to enter a nonſuit, on the ground that the leaſe had been depoſited with the defendant's ſon for the joint benefit of *Bridge* and *Taylor*; one of whom alone could not recover it without the conſent of the other. But when the matter came on to be heard in this term upon the Lord Chief Baron's report:

Lord ELLENBOROUGH C. J. ſaid, that it was clear that if the leaſe had been depoſited by *Bridge* and *Taylor*, and the bailee had agreed to keep it for the two, it was not in the power of one of them (or of the aſſignees who repreſented that one) to take it out of his hands, without the conſent of the other. But here there was no evidence that it was depoſited by the two, or that *Bridge* had any notice that it was ſo depoſited by *Taylor* on their joint account. It is true that the bankrupt in his evidence ſaid that it had been agreed by *Bridge* and him that the leaſe ſhould remain in the hands of the defendant's ſon: but it did not appear that the bailee had any notice of this, or had accepted it upon any ſuch truſt; and he and the defendant afterwards dealt with it as belonging to *Taylor* alone. The foundation therefore fails on which the rule niſi was granted.

Per Curiam, Rule diſcharged.

Garrow and *Marryat* were to have oppoſed the rule.

(*a*) I was not preſent in court when the motion was made

1811.

Thursday, Jan. 24th.

BOYFIELD *against* PORTER and Another.

The general highway act 13 *Geo.* 3. *c.* 78. *f.* 27 & 29., authorising surveyors of highways to take and carry the refuse stones from quarries for the repair of the highways, *making satisfaction for damage done* to the lands of any person *by carrying away* the same; and directing that if the surveyors cannot agree with the land-owners upon the amount of such satisfaction, *it shall be settled and ascertained by an order of justices*; and providing further, that no plaintiff shall recover for any trespass, &c. if tender of sufficient amends be made before action brought; and that in case no such tender be made, the defendant, by leave of Court, before issue joined, may pay money into court: held that surveyors having broken a new way over the plaintiff's land, in order to carry such materials for repair, in a case where an old but circuitous road existed before; and having, *after* the damage done, and after an action of trespass brought against them, paid money into court by way of amends; the sufficiency of such amends cannot be questioned at nisi prius; the statute having referred the quantum of amends, if not agreed upon, to the decision of justices of the peace.

But it seems to be competent to the plaintiff in such action to shew that the making of such new road over his land was maliciously or wantonly done by the surveyors, and not for the necessary or convenient carriage of the materials over the land for the purposes of the act; and in such case he would not be concluded by the amends tendered or paid into court.

THE general highway act, 13 *Geo.* 3. *c.* 78. *f.* 27. enables the surveyor to take away so much of the refuse stones of any quarry within the parish, &c., without the licence of the owners, as he shall judge necessary for the amendment of the highways; and also to dig for and carry away materials from any waste land, &c. for the same purpose, without making any satisfaction for those materials; "*but satisfaction shall be made for all damages* "*done* to the lands of any person *by carrying away the* "*same, in the manner hereinafter directed* for getting and "carrying materials in inclosed lands," &c. By *f.* 29. if sufficient materials cannot be had within such waste lands, &c. it shall be lawful for every such surveyor to dig, &c. for them in the inclosed lands of any person within the parish, &c. (not being a garden, &c.) "and to take "and carry away so much of the said materials as "*by the discretion* of the said surveyor shall be thought "*necessary* to be employed in the amendment of the said "highways; *the said surveyor making such satisfaction for* "*the damage to be done* to such lands by the getting and "carrying away the same, as shall be agreed upon be-

"tween

"tween him and the owners, &c.: *and in case they can-* "*not agree, then such satisfaction and recompence shall be* "*settled and ascertained by order of one or more justice or* "*justices of the peace* of the limit where such land shall "lie." And *s.* 79. provides, "that no plaintiff shall reco- "ver in any action for any irregularity, trespass, or wrong- "ful proceedings, if tender of sufficient amends shall be "made on behalf of the parties who shall have commit- "ted such irregularity, &c. before such action brought. "And in case no such tender shall have been made, it "shall be lawful for the defendant, by leave of the "Court, before issue joined, to pay into Court such sum "of money as he shall see fit; whereupon such proceed- "ings or orders and judgment shall be had, made, and "given, as in other actions when the defendant is al- "lowed to pay money into Court." The 80th section gives an appeal in cases not otherwise provided for; but no question was made upon that clause.

The defendants in this case were the surveyors of the highways in the parish of *Buckminster* in *Leicestershire*: and the plaintiff brought this action of trespass against them for breaking and entering his close, called *Coy's Close*, in that parish, on the 25th of *March* 1810, and on divers other days, and passing over it with carriages, and digging the soil, and prostrating the fences, and making a carriage road, and laying gravel, &c. on it, and erecting and continuing a gate and posts there. The defendants pleaded the general issue, and paid 24*s.* into court, by way of amends, under the 79th section of the act. At the trial before *Thomson* B. at *Leicester*, the plaintiff's counsel opened the case by stating, that the trespass was committed under pretence of legal authority by the defendants, as surveyors of the highways for

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the parish. That there was a stone-pit in the *Vicar's Close* (next but one to *Coy's Close*, but in the opposite direction from that part of the road to which the materials for repair were to be carried,) out of which there was an old carriage way leading, though somewhat circuitously (*a*), to that part of the highway which was under repair; but that the defendants had forsaken the old way, and had broken up the plaintiff's close, and had made a new way over it into the highway, and had for that purpose cut down his fence and put up a gate. And that the defendants having paid 24*s*. into court under the 79th section of the general highway act, the question between the parties was upon the sufficiency of the amends. On the other hand the defendants' counsel contended for a nonsuit; for that the payment of money into court did not in this case admit the plaintiff's right of action any more than a tender by justices of the peace in actions of trespass brought against them for acts done by them ex officio. That the 27th and 29th sections of the general highway act enables the surveyors to get and carry away materials for the amendment of the roads, making satisfaction to the owners of lands for damages done by carrying away the same, to be ascertained in the manner thereby directed: and that therefore the defendants had a right to get the refuse stone and carry it over the plaintiff's land to the road under repair, subject to a satisfaction to be *subsequently* ascertained in the method prescribed by the 29th section. The plaintiff's counsel, in reply, contended, that the defendants, in order to excuse themselves from the trespass,

(*a*) It was a bending road, forming a considerable segment of a circle; and the old way appeared by the map to be about two-thirds further to the place under repair than the new way, which had been opened across the plaintiff's field by the surveyors.

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ought to have tendered adequate compenſation *before* they did any act. But the learned Judge, being of opinion with the defendants upon the conſtruction of the act, nonſuited the plaintiff, without entering into evidence on either ſide. A rule niſi was obtained in the laſt term for ſetting aſide the nonſuit, upon the conſtruction of the act; and alſo upon a ſuppoſition, (which was ultimately not borne out by the judge's report,) that the nonſuit might have proceeded upon an objection ſaid to have been taken at the trial, that inaſmuch as the act of parliament veſted a diſcretion in the ſurveyors to break and enter cloſes contiguous to the highways, for the purpoſe of getting and carrying materials for their repair when neceſſary; if they vexatiouſly and unneceſſarily exerciſed that diſcretion, the proper remedy was by action on the caſe, and not of treſpaſs.

Clarke and *Reader*, on ſhewing cauſe now, diſclaimed any reliance on the ſuppoſed objection laſt-mentioned, and agreed in the general rule, that if one having authority by law to enter on another's poſſeſſion under certain circumſtances, exceed that authority and abuſe the power confided to him, he makes himſelf a treſpaſſer ab initio. But they contended, firſt, that the payment of money into court, by way of tendering amends under the 79th ſection of the act, was no admiſſion of a cauſe of action, ſo as to reduce the queſtion to the ſufficiency in fact of the amends thus paid in: and that ſuch tender was not required by the act to be made before the entry of the ſurveyors; but from the very nature of the thing muſt be made afterwards; becauſe, till it was aſcertained what damage was in fact done to the land, it was impoſſible to eſtimate the proper amount of the

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amends to be made. And, next, that the 29th section having prescribed the mode by which the amount of the satisfaction to be made for the damage done shall be ascertained, in case the parties cannot agree; namely, by one or more justices of the peace for the limit where the land lies; the sufficiency of the satisfaction tendered could not be questioned in any other shape; and therefore that the learned judge did right in not entering into that question at the trial.

Vaughan Serjt. and *Torkington*, in support of the rule, after observing that the case was disposed of on the opening of it by the plaintiff's counsel, without going into evidence, said that they were instructed and prepared to prove an unnecessary and vexatious exercise by the defendants of the powers given them by the act in this instance. That there was, long before that time, an established and well-known road from the stone-pit close into another part of the highway under repair; and even if it were somewhat more circuitous than the way newly made to that part of the highway where the repairs were then to be made, (which they denied) yet that would not give the surveyors authority to break a new way over the plaintiff's close and fences. The power to surveyors by the 29th section to take and carry away materials from inclosures is only given if sufficient cannot *conveniently* be had within the wastes and other open common lands in the parish; and it is only to take and carry away so much of the said materials "as by the *discretion* of the surveyor "shall be thought *necessary* to be employed in the amendment of the said highways: the said surveyor making "such satisfaction for the damage to be done as shall be "agreed," &c. It appears, therefore, by these and similar

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lar terms used in the 27th clause, that the legislature only looked to the exercise of these powers according to the *convenience* and *necessity* of the case in the *honest discretion* of the surveyors: and supposing that where there is a known and established road by which the materials may be carried, it is competent to the surveyor to make a new way over inclosed land without the consent and to the detriment of the owner, in order to save a trifling distance to the spot under repair, at any rate it was competent to the plaintiff to negative by evidence the necessity and convenience of the new way, and to shew that the power was vexatiously exercised in this instance, by making a new way when the old way was nearer or more convenient. [*The Court* however observed, that no case of this sort had been laid before the learned judge at the trial. No doubt it would have been competent to the plaintiff to have proved a malicious and vexatious trespass committed on his land by the defendants, under the mere colour of their authority, as surveyors. The act indeed enables the surveyors to put the merits of their case upon the plea of the general issue: but if it had been necessary for them to plead specially the matter of their justification to the trespass complained of, the plaintiff might have new assigned, that the breaking and entry were done for other purposes than those stated under the act. But the case presented at the trial was very different from that.] They then contended, upon the construction of the act, that it was competent to the plaintiff to shew that his damage amounted to more than the sum paid into court in satisfaction: and if the amends tendered or paid into court be not sufficient, the party is a trespasser ab initio; the authority being only given to the surveyor "making such satisfaction for the damage to be "done,"

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"done," &c.: and but for the act enabling the defendants to plead the general issue, and give the special matter in evidence, the justification on the record would not have been complete, without averring the sufficiency of the amends, and therefore the action is properly brought in trespass, and not in case. [*Le Blanc* and *Bayley*, Justices, put the question to the plaintiff's counsel to consider whether the act does not require that the sufficiency of the amends, if disputed, shall be settled by the magistrates? They referred to the words, "the said "surveyor making *such* satisfaction for the damage to be "done, &c. *as* shall be agreed upon between him and "the owner, &c. And in case they cannot agree, *then* "*such satisfaction and recompence shall be settled and ascer-* "*tained by order of one or more justices*," &c. If then the plaintiff, they observed, were not likely to agree, or did not chuse to trust to the amends which might be offered to him by the surveyor, was it not his business to summon the surveyor before a magistrate, in order to have the amount ascertained? And is not that the only tribunal appointed by the act, in case of difference, for ascertaining the quantum of the amends?] Admitting that either party might have resorted to that tribunal: yet not having done so, and the amends having been paid into court since the action brought, the sufficiency can only be decided by the Court at the trial. They also contended that in order to justify the trespass, the amends must be estimated and tendered in the first instance before the entry of the surveyors: observing, that the 29th section, giving power to the surveyor to enter upon *inclosed* lands, only gave it upon his "making such satis- "faction for the damage *to be* done," &c. which was therefore prospective, and differently worded from the

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27th clause respecting the getting of materials from wastes, &c. which requires satisfaction to be made "for "all damages *done* to the lands," &c. And the reason for requiring prospective satisfaction to be made for damage in the case of inclosed lands may be, as well on account of the higher estimate which might in some cases be formed, so as to make it inexpedient to incur the expence, as to prevent the surveyors being harrassed by repeated summonses before a magistrate to estimate the damage for every cart load taken, which it would not be thought worth while to do on account of materials taken from open lands.

Lord ELLENBOROUGH C. J. The only trespass on which we have now to decide is for taking the refuse stone from a quarry, and carrying it over the plaintiff's land; not for digging stone there: and the convenience of the case, as well as the fair meaning of the words, requires that the satisfaction should be made subsequent and not antecedent to the damage committed: for the mere difference of the weather, whether wet or dry, during the continuance of the operation, may make great difference in the amount of the injury done to the land, and in the consequent compensation. The convenience of the case is indeed all one way: and the party injured will make his application when he thinks that his whole compensation is capable of being ascertained. Then, as to the sufficiency of the amends offered in this case, it was not the meaning of the legislature that it should be settled at nisi prius; for the act says in terms, that if the parties cannot agree, "then such satisfaction and recom-"pence shall be settled and ascertained by order of one "or more justice or justices of the peace of the limit "where

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"where such land or ground shall lie." The parties, therefore, have no choice of any other tribunal to settle the amends in any case within the act. If indeed the trespass be committed maliciously, and not for the purposes of the act, it is not a case within it, and the plaintiff would be entitled to recover damages by the verdict of a jury. But that was not the case submitted to the learned judge at the trial: the only two questions submitted to him were as to the competency of the Court at nisi prius to inquire into the sufficiency of the amends; and whether a tender of amends after the trespass committed were sufficient; and those two points were, I think, rightly decided against the plaintiff.

Grose J. declared himself of the same opinion.

Le Blanc J. The defendants are surveyors of the highways, and did the acts complained of in that character under the statute: and one of the objects of that statute was to preserve the officers appointed to execute it from being harrassed by a multiplicity of actions, by establishing a domestic tribunal, by which disputes of this sort should be settled without loss of time or expence. Therefore, if the surveyors cannot agree with the owners or other persons interested in the land as to the amount of the satisfaction to be made for obtaining the materials, or carrying them over the land, they must resort to one or more justices, by whom such amount is to be settled; and this is the only tribunal by which the quantum of amends is to be ascertained. Then as to whether the amends are to be tendered before or after the trespass; a difference has been observed between the words of the 27th and 29th sections; and it is said, that the latter

speaks

ſpeaks of the damage *to be* done: but however that may be, it is ſufficient to ſay that this caſe falls within the 27th ſection, which ſpeaks of ſatisfaction to be made for all damages *done* (not *to be* done) to the lands of any perſon by carrying away the materials, in this inſtance, the refuſe ſtones from a quarry: and this ſatisfaction is to be made "in the manner thereinafter directed for getting "and carrying materials in incloſed lands." The ſubſequent clauſe then, which points out the manner, uſes the words "damages *to be* done" with reference as well to the former clauſe as to the antecedent part of the ſame clauſe: the difference, therefore, if any, between the two clauſes is rather in favour of the defendants' conſtruction.

BAYLEY J. Where there is a ſubſiſting road by which the materials may be carried, the ſurveyors are not wantonly to deviate from that, and to make a new road for the purpoſe: but where there was not a convenient road before, the act authorizing the getting and taking of the materials in incloſed lands where they cannot conveniently be gotten in the open lands of the pariſh, and the getting them from another pariſh where they cannot conveniently be had in the ſame pariſh where the highway to be repaired lies, authorizes the making of a new road in order to get them conveniently. It was competent however to the plaintiff to have ſhewn by evidence that the new road was wantonly made, where the purpoſes of the act would have been fairly and effectually anſwered by carrying the materials by the old road. But no evidence was offered to the judge at the trial that the new road acroſs the plaintiff's land was wantonly and maliciciouſly made. Then as to the proper period for offering the amends; it certainly cannot be ſo conveniently aſcer-

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tained what is the proper quantum of amends to be made till it is known what is the quantum of the damage sustained. And under the 29th section, where power is given to dig in inclosed lands for the materials as well as to take and carry away such as are already prepared, there must be less means of judging accurately of the quantum before the damage is done, though the words there used are "damage *to be* done," than under the 27th section, where the right to dig for materials is confined to waste land, and where the refuse stone only is to be taken from any quarry. But at any rate this appears to be a case of damage done under the 27th clause.

Rule discharged.

Friday, Jan. 25th.

RIGHT, on the Demise of LEWIS and Others, *against* BEARD.

One who is put in possession upon an agreement for the purchase of land cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise; and even considering such lawful possession as a tenancy at will, the defendant's confession, (by entering into the common rule,) of a lease by the lessor to the nominal plaintiff, is not a constructive determination of the will whereon to maintain the ejectment.

THIS was an ejectment brought to recover two acres and a beast-grass of land, in the parish of *Monkland*; and at the trial before *Lawrence* J. at *Hereford*, it appeared that the land had formerly belonged to *Lewis*, the lessor of the plaintiff, and that he had it in hand from the year 1793 till *May* 1809, when, as it appeared by the defendant's evidence, the possession of it was formally delivered by *Lewis* to the defendant, by the breaking and delivery of a bough, and by *Lewis* ordering the defendant to plough a furrow, as possession. On the part of the defendant also two notices were read, signed by himself, and proved to have been served; the one directed to one *W. Parry*, the mortgagee

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gagee of the land, stating an agreement between *Lewis* and the defendant for the purchase of it, and that the defendant was ready to pay off all the mortgage money: the other directed to *Lewis*, requiring him to deliver to the defendant the title deeds, or abstracts of them, that conveyances might be prepared; and stating that the defendant was ready to pay him 60*l.* on the conveyances being executed: and further, the defendant proved a receipt by *Lewis*, dated the 1st of *June* 1809, for 12*l.* parcel of the purchase money paid by the defendant. It was thereupon contended, on the part of the defendant, that he was legal tenant at will of the land, and that until demand and refusal of the possession, he was not a trespasser, as the declaration supposed him to be. In answer to which it was said that the defendant had taken possession under a supposed title, and had not been let in under any tenancy, and therefore not as tenant at will: but even if he had been tenant at will, the confession of lease, &c. under the common rule, admitted a lease to the plaintiff, which would determine any such tenancy. The learned judge concurred in thinking, that the defendant's possession being lawful required to be determined by notice to deliver it up: but on the other point, to save expence, the plaintiff took a verdict, and leave was reserved to the defendant to move the Court to enter a nonsuit, or a verdict for himself.

Abbott on moving in the last term for a rule for this purpose, referred to *Goodtitle* v. *Herbert* (*a*), and *Doe* v. *Wilson* (*b*), in both which a demand of possession was held necessary to support an ejectment against a tenant at will, without any such effect attempted to be given to

(*a*) 4 *Term Rep.* 680. (*b*) 11 *East*, 56.

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the confeffion rule: and he alfo referred to the opinion of *Buller* J. in *Birch* v. *Wright* (*a*), that in the cafe of tenant at will, the demife in ejectment cannot be laid on a day antecedent to the determination of the will.

The Court granted the rule, faying that there was no foundation for attributing fuch an effect to the admiffion of the fictitious leafe by the confent rule. And when the cafe was called on in the peremptory paper of this term, Lord *Ellenborough* C. J. expreffed his hope that the Court would hear nothing further of the argument derived from the defendant's confeffion of a leafe from the leffor to the plaintiff, as determining the lawful poffeffion of the defendant. And he added that after the leffor had put the defendant into poffeffion, he could not, without a demand of the poffeffion again and a refufal by the defendant, or fome wrongful act by him to determine his lawful poffeffion, treat the defendant as a wrong doer and trefpaffer, as he affumes to do by his declaration in ejectment. *Le Blanc* J. obferved, that the rule for confeffing leafe, entry, and oufter was only entered into after the delivery of the declaration in ejectment, and could never prove that the defendant was a trefpaffer before that time.

Per Curiam, Rule abfolute (*b*).

(*a*) 1 *Term Rep* 383. and vide *Denn* v *Rawlins*, 10 *East*, 261.
(*b*) Vide *Kirtland* v. *Pounfett*, 2 *Taunt*. 145.

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BRETT, Assignee of HARRISON, a Bankrupt, *against* LEVETT.

Friday, Jan. 25th.

UPON a rule for setting aside the verdict obtained by the plaintiff for 676*l.* 6*s.* 5*d.*, and for entering a nonsuit, *Le Blanc* J., before whom the cause was tried at the last assizes at *Stafford*, reported that this was an action by the assignee of a bankrupt against the defendant, as late sheriff of the county of *Stafford*, to recover 676*l.* 6*s.* 5*d.* levied by the sheriff on the 30th of *March* 1810, upon the goods of the bankrupt after his bankruptcy, under a writ of execution on a judgment obtained against him at the suit of a creditor. The only question of law, upon which the rule was granted by the Court, arose upon the petitioning creditor's debt: as to which the facts were these. The act of bankruptcy was on the 28th of *December* 1809. The commission of bankrupt, dated the 8th of *February* 1810, issued against *Harrison*, upon the petition of *Brett* and *Gilbert*, bankers, whose debt arose upon two bills of exchange for 50*l.* each, both drawn by *Harrison*, and both finally dishonoured by the drawee; the one dated the 25th of *November* 1809 at two months in favour of one *Griffin*, by whom it was indorsed and paid to *Brett* and *Gilbert* on the 27th of *November*, and which became due on the 28th of *January* 1810: the other dated the 2d of *December* 1809, at 45 days, which was paid immediately to *Brett* and *Gilbert* by *Harrison* himself, and became due on the 19th of *January*: so that both the bills became due *after the act of bankruptcy*, but *before the commission issued*. Upon which the objection arose, that *at the time of the act of bankruptcy*

Bills of exchange to the amount of 100*l.* drawn and issued by a trader before an act of bankruptcy, but becoming due afterwards, are sufficient when due to found a petition for a commission of bankrupt against him. But note, the bankrupt was in fact indebted to different persons at the time of the act of bankruptcy in more than 100*l* even allowing the rebate of interest upon the bills calculated back to that period. Want of notice to the bankrupt drawer of the dishonor of one of the bills may be supplied by evidence of his acknowledgement to the holder when asked if the bill would be paid, that it would not; though such acknowledgment were made after the act of bankruptcy committed.

on the 28th of *December* 1809 there was not 100*l.* due to the petitioning creditor, but only that sum minus the rebate of interest for the times which the bills had then to run. But at that period there were other small creditors of the bankrupt, whose debts, together with what was then due on these bills to the bankers, amounted to more than 100*l.*, and the bills were both due before *Brett* and *Gilbert* petitioned for the commission.

Another question was made by *Peake* on moving for the rule, which arose upon the admissibility of evidence at the trial. In order to account for want of notice to *Harrison*, the drawer, of the dishonor of the first bill, a witness was called, who spoke to a conversation between the plaintiff and *Harrison* subsequent to the 28th of *December*, the day on which the act of bankruptcy was proved to have taken place, in which the plaintiff asked *Harrison* if the bill would be paid; who answered *no, that it would come back*. On which it was objected, that no evidence of any admission by the bankrupt after the act of bankruptcy could be received in evidence to do away the want of notice: but the learned judge overruled the objection, and received the evidence; which this Court agreed to be right, and refused the rule on that point (*a*).

Dauncey and *Puller* shewed cause against the rule, upon the other point; and contended that there was a good petitioning creditor's debt of 100*l.* due without any rebate at the time of the petition, (which was the period to look to) upon the bills drawn and issued by the bankrupt

(*a*) Vide *Dowton* v. *Cross*, 1 *Esp. N. P. Cas.* 168. and *Chapman* v. *Gardner*, 2 *H. Blac.* 279.

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before the act of bankruptcy. They relied on the plain words of the stat. 7 *Geo.* 1. *c.* 31. which first declares that "*every person who has given credit on such securities* (*i. e.* bills payable at a future day) to any person who is or shall become bankrupt, &c. which is or shall not become due or payable at or before the time of such person's becoming bankrupt, shall be admitted to prove his bills, &c. *in like manner as if they were made payable presently*, &c. and to receive a proportionable share, &c. deducting only thereout a *rebate of interest*, &c. *to be computed from the actual payment thereof* to the time such debt, &c. would have been due and payable in and by such securities as aforesaid:" and then provides by *s.* 3. that "no such creditor shall be deemed to be *a sufficient creditor*, in respect of such debt, *to petition*, &c. for any commission *until* such time as such debt shall become due and payable;" From whence it must be inferred that *when* the bill becomes due (as in this case) the legislature must have considered that it was a good foundation for a petitioning creditor's debt. But the total repeal of that disabling clause by the stat. 5 *Geo.* 2. *c.* 30. *s.* 22., which makes it lawful for such a creditor to petition, puts the matter out of doubt. They also relied on the opinion expressed by Lord *Kenyon*, in *Glaister* v. *Hewer* (*a*), that all that the act of parliament required was that there should be an existing debt of 100*l.* in the petitioning creditor (*b*): and that the petitioning creditor there had such a debt *at the time of pe-*

(*a*) 7 *Term Rep.* 499.

(*b*) His Lordship must be understood to have said this with reference to the case before him of a debt existing upon a promissory note against the bankrupt's estate *at the time of the act of bankruptcy*, though indorsed afterwards to the petitioning creditor to enable him to become such. Vide *Bamford* v. *Burrell*, 2 *Bos. & Pull.* 1.

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titioning; which was sufficient to support the commission.

Jervis and *Peake*, contrà, relied on the stat. 5 *Geo.* 2. *c.* 30. *s.* 23. which requires the petitioning creditor's debt to amount to 100*l.*, and the construction put upon it in all the cases, that the debt must exist at the time of the act of bankruptcy in order to make it avail for that purpose. The stat. 7 *Geo.* 1. *c.* 31. was the first which enabled creditors of this description, whose securities though existing at the time were not payable till a future day, to prove under the commission: but that excepts such securities from founding a good petitioning creditor's debt. Then when that exception was repealed by the stat. 5 *Geo.* 2., though holders of bills payable at a future day were thereby let in to petition for a commission, yet it left untouched the provision relating to the amount of the petitioning creditor's debt; which must still be 100*l.*; calculating that amount, as all other debts proveable under a commission must be calculated, with reference to the period of the act of bankruptcy, in conformity with the general principle of the bankrupt laws. A bill creditor proving his debt under the commission, though he should not receive payment till after the bill became due, would only receive the amount, with a rebate of interest up to the time of the act of bankruptcy (*a*); and the 7th section of the last-mentioned act

(*a*) *Cullen's Bank. L.* 118. says, that when interest is allowed to be proved, it is never in any case of an insolvent estate allowed to be computed lower than the date of the commission. And reference is there made to *Bromley* v *Goodere*, 1 *Atk* 79; but it appears from the principal case, that where the estate was solvent with a surplus, interest was decreed on securities carrying interest down to the time of full payment.

only

only discharges the bankrupt from debts due at the time he became such. In a special plea of bankruptcy, in which it would be necessary to set forth all the circumstances, the averment must have been that the trader *being indebted to* A. B. *in* 100l. committed an act of bankruptcy. In *Glaister* v. *Hewer* (*a*), it was clear that the bankrupt was indebted in 100*l.* and more at the time of the act of bankruptcy: the only question was whether the transfer of a bill to the petitioning creditor after the act of bankruptcy, which was outstanding before in other hands, and without which his debt did not amount to 100*l.*, were sufficient to found the petition: but the decision of that case in the affirmative does not conclude the present. [*Le Blanc* J. noticed that this bankrupt was proved at the trial to have been indebted in more than 100*l.* at the time of the act of bankruptcy to different creditors: though neither of them could then have made a good petitioning creditor: and that was the situation in which the bankrupt stood in the case of *Glaister* v. *Hewer*, at the time of his bankruptcy; in which respect the two cases are alike.] The petitioning creditor however in that case afterwards acquired by relation a sufficient debt, allowing the rebate of interest, to have supported a petition at the time of the act of bankruptcy; for, as indorsee of the bill, he stood in the situation of the prior holder. In confirmation of this principle they also referred to *Bingley* v. *Maddison* (*b*), Ex parte *Wainman* (*c*), Ex parte *Thomas* (*d*), and an anonymous case in 2 *Wils.* 135.

(*a*) 7 *Term Rep.* 499.

(*b*) *Mich.* 1783. *B.R. Cooke's Bank. L.* 19. The bill there was for 100*l.* which was due before the act of bankruptcy, though not indorsed till afterwards to the petitioning creditor.

(*c*) *Ib.* 21. (*d*) 1 *Atk.* 73.

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Brett *against* Levett.

Lord Ellenborough C. J. We are now to decide upon a cafe where the petitioning creditor had a debt of 100*l.* due at the time of his petitioning, upon two bills for 50*l.* each, drawn and iffued by the bankrupt before the act of bankruptcy, but which did not fall due till afterwards; and the queftion is, whether that conftitutes a good petitioning creditor's debt? The words of the ftat. 7 *Geo.* 1. *c.* 31., feem to have decided the queftion. For that ftatute, which admits of the proof under commiffions of bankrupt of debts arifing on bills, notes, and other fecurities payable at a future day, provides, that no creditor upon fuch fecurities fhall be deemed to be a fufficient creditor to petition for any commiffion "until fuch time as fuch debt fhall become due and payable." Then can it be doubted that the legiflature intended, that when the debt did become due to the holder of fuch fecurities, he might be a petitioning creditor. So the law ftood till the ftat. 5 *Geo.* 2., which repealed the prohibition, and confequently enables the holders of fuch fecurities payable at a future day to become petitioning creditors, where their debts are of fufficient amount. In this cafe, however, the affignee of the bankrupt does not want to remove the prohibition of the ftat. 7 *Geo.* 1. out of his way, becaufe the debt of the petitioning creditor to the full amount of 100*l.* upon the bills was actually become due and payable at the time of the petition within the precife words of that act. Therefore without wandering into cafes, the application of which to this cafe can only tend to miflead us where the words of the act of parliament are fo plain, it is clear that this petitioning creditor's debt, being due at the time of petitioning, is the very cafe which was contemplated to be fufficient by the act of the 7 *Geo.* 1.

Grose

GROSE J. was of the same opinion.

LE BLANC J. This is not to be considered as a decision upon a case where the bankrupt was only indebted, at the time of the act of bankruptcy, upon bills to the amount of 100*l.* payable at a future day; for it is clear that he was at that time indebted altogether to more than that amount to different persons, even allowing the rebate of interest on the bills computed to the time of the act of bankruptcy. I only mention this to shew that the circumstance has not escaped the attention of the Court. Then the only question here is, whether the bankers, who were creditors upon the two bills to the amount of 100*l.* at the time of petitioning for the commission which afterwards issued, had a good petitioning creditor's debt: and that is decided by reference to the words of the statute.

BAYLEY J. Though no commission could have been issued against *Harrison* upon the petition of any particular creditor or creditors immediately after the act of bankruptcy committed by him, as matters then stood, yet that would have been no objection to a commission afterwards sued out upon the petition of a sufficient creditor, to whom a debt outstanding against the bankrupt's estate at the time of the act of bankruptcy, upon a bill payable at a future day, had been transferred after the act of bankruptcy; for that was the case of *Glaister* v. *Hewer*. There indeed the debt on which the petition was founded existed as a debt to the amount of above 100*l.* against the bankrupt's estate at the time of the act of bankruptcy, though in different hands; but here also there was an existing debt against the bankrupt's estate of above 100*l.*, in dif-

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ferent hands at the time of the act of bankruptcy, though not the same debt on which the petition issued. But the act of the 7 *Geo.* 1. meant to place creditors on bills, &c. payable at a future day, in the same situation, as to the proof of their debts, as if they were payable presently, only with a rebate of interest on the time they had to run; restraining only the right of such creditors to petition for a commission until such securities became due. This restriction was removed by the stat. 5 *Geo.* 2. But the restriction was only meant to apply to creditors who held bills which were not due at the time of petitioning, and they are now let in as other creditors, proving their debts with a rebate of interest. But here the bill holders waited till the bills were due, and till 100*l.* was due upon them; and therefore upon the view of both the acts of parliament, this was a sufficient petitioning creditor's debt.

Rule discharged.

Friday, Jan. 25th.

The KING *against* The Inhabitants of the County of KENT.

The *Medway* Navigation Company being empowered under a local act (16 & 17 *Car* 2.) to make the river navigable, and to take tolls; and "to "amend or alter such bridges or highways as might hinder the passage or navigation, *leaving* them or "others as convenient in their room," &c.; and they having 40 years ago destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place, are bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit.

THIS indictment charged, that a public and common bridge, called *St. Helen's* bridge, situate in the King's common highway, over the river *Medway*, in the parishes of *East Barming* and *West Farleigh*, in the county of *Kent*, was out of repair, &c. and that the inhabitants of the county were bound to repair it. The inhabitants

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of the county (excepting the company of proprietors of the navigation of the River *Medway*) pleaded, that long before the time of erecting the said bridge, and at the same place, and in the same part of the river *Medway*, where the said bridge was erected, there was, and from time to time immemorial, until the deepening of the water as after-mentioned, there had been a public highway through a ford in the river *Medway*, in the said parishes of *East Barming* and *West Farleigh*, in the county aforesaid, for all the subjects of the king to pass, &c. with their cattle and carriages, at all times of the year, at their free will: And further, that the company of proprietors of the navigation of the river *Medway* afterwards, and before the erecting of the said bridge, to wit, on the 1st of *June* 1740, for the purpose of the navigation of the said river, and for the profit of the said company, did greatly deepen the water in the same place and part of the river *Medway* where the said ford and highway before then was and had been for all the time aforesaid, and where the said bridge was afterwards erected as after-mentioned; and did by such deepening of the water destroy the said ford, and render the said highway wholly impassable; and it then and there became and was necessary for the liege subjects of the king, their cattle and carriages, and the duty of the said company, to erect a bridge at the same place over the river *Medway*. Whereupon the said company afterwards, to wit, on the 10th of *June* 1767, did first erect the said bridge in the indictment mentioned in the same place and part of the river *Medway* where the said ford and highway, before the said deepening of the water of the said river, was and had been for all the time aforesaid, and in the room and stead of the said highway and ford, as a convenient

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venient, fit, and useful means of passage for the liege subjects of the king, by themselves and with their cattle and carriages over the river *Medway*; and the said highway thereupon, to wit, on the day and year last abovementioned, was altered by the said company from and out of its ancient course through the said ford unto and over the said bridge, and from thence hitherto has been carried and gone unto and over the said bridge. By reason of which last mentioned premises, the said company of proprietors of the navigation of the river *Medway* always, from the time of the said bridge being so erected as aforesaid, hitherto have repaired and amended, and have been liable to repair and amend, and during all that time and still of right ought to have repaired and amended the said bridge, when and so often as occasion hath required or shall require; and then the plea traversed, that the inhabitants of the county were bound to repair the bridge: and the replication took issue on their obligation to repair.

A venire having been prayed and issued into the county of *Sussex*, this indictment was tried there before the Lord Chief Baron, when the use of the bridge by the public since the building of it in 1767, and its destruction by a flood in *January* 1809, were proved without question; and that since that time persons living near had to go round two miles and a half to get on the other side of the river. But it also appeared that before the building of the bridge by the *Medway* Company in 1767 there was a public highway and a ford across the river at that place, passable at all times except after heavy rains and for about two months in the winter. In general foot passengers might walk over dry-shod by stepping on the stones across the bed of the river. A lock was first made

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in 1741 and a quantity of gravel dug away, which first deepened the water at the ford, insomuch that a horse could but just manage to get across when the lock was shut, and persons were obliged to go round, except when the water was occasionally drawn down. Things continued in this state for nearly 25 years, when the company having been threatened with an indictment for the destruction of the highway across the ford, unless they would supply the place of it by building a bridge; they built the late bridge in 1767, and repaired it till its demolition. An entry was read from their books dated 11th *June* 1740, wherein their sub-committee report that several bridges would be necessary, and amongst others, one at the place in question, which was denominated *a highway:* and this was confirmed by subsequent resolutions of the company in 1742, and 1765. By levels taken, it appeared that the lock had raised the water at the old ford 6 feet 3 inches at its utmost depth in the middle, and 3 feet at least at the sides: and that without the lock the ordinary depth of the water would be only 4 or 5 inches. Evidence was also given that the *Medway* Company receive freight for the use of their barges; but that they are not the only carriers on the navigation. That they take duties for locks and riverage; and that their last dividend was 15*l.* per cent. on their capital. A verdict of guilty was taken, with leave to the defendants to move to enter a verdict for them, if the Court should be of opinion that the inhabitants of the county were not liable under these circumstances.

By a private act of the 16 & 17 *Car.* 2. for making the river *Medway* navigable in *Kent* and *Sussex*, reciting the convenience of such intended navigation for the public weal, it is enacted, that it shall be lawful for the per-

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sons therein named, and their heirs and assigns, &c. at their own costs and charges, to *cleanse, scour, dig, widen, deepen, and make navigable the said river*, and the rivers, streams, and watercourses falling into the same in the said counties, and to make new channels and trenches, &c. as they should think fit, and to erect locks, weirs, turnpike dams, &c. upon the same, "*and to amend or alter such bridges or highways as might hinder the said passages or navigation, (leaving them or others as convenient in their room* fit and useful for carts, waggons, wains, horse, and foot, as the case required,) and to make any ways, passages, &c. for carrying of iron, ordnance, &c. to the said river: *and to do all other things* for the better conve[illegible]nce of the said rivers, streams, &c. and the said ways, passages, &c. and for the altering, repairing, keeping, using, and amending of the same and every of them from time to time, and at all times thereafter as need should require." By a subsequent act of the 13 *Geo.* 2. the powers of the former act were directed to be carried into execution by other persons united and incorporated into a company for that purpose, to be called The Company of Proprietors of the Navigation of the River *Medway*; and they were allowed to take to their own use certain tolls of lockage and riverage of vessels navigated thereon by other persons, and the profits of all vessels by themselves.

In moving for the rule in the last term, *Taddy* observed, that inasmuch as the act of parliament authorized the proprietors of the navigation to alter the state of the river and to build the bridge, the county could not treat it as a nusance; and as it was built for their benefit, and they were entitled to levy tolls for the navigation, which had induced the necessity of building the bridge in lieu of the passage by the old ford which the naviga-

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tion had destroyed, they were bound to keep the bridge in repair: and that the proprietors, being a corporation, must be presumed after 40 years acquiescence in the repair to have agreed to bear the expences out of their corporate funds.

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Marryat and *Berens* now opposed the rule, and contended that by the general rule of law the burthen of repairing all bridges of public utility and used by the public, by whomsoever and on what account soever executed, was thrown upon the inhabitants at large of the county, unless by prescription or the special enactment of the legislature that burthen was in any particular instance imposed upon others: and here there was no such special provision: nor is there any fund provided for that purpose by the local laws. The words of the statutes are not imperative on the company to build a bridge; it is only enacted that it shall be lawful for them to do certain acts. They stand therefore precisely in the same situation as any individual would do, who for his own advantage or gratification built a bridge in the public highway, the use of which was adopted by the public; in which case the authorities shew that the county are liable to the repair, although the individual may have repaired in the first instance. In the *Glamorganshire* case (*a*), and others, the material question has been, whether the bridge were of public utility. In one of the late cases, Lord *Portmore*, who had become the sole proprietor of the navigation of the river, was indicted for not repairing *Wey-bridge*, which he was empowered to build under the act: but he was acquitted, it being con-

(*a*) Cited in 2 *East*, 356 *n* and 1 *Bac. Abr.* 535. by *Gwillim*.

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sidered that the county was liable. And in the recent case of *Frimley* bridge, half of which was in *Surrey*, and half in *Hants*; where a new bridge had been built upon an enlarged scale by the trustees under a turnpike act, in lieu of another which the two adjoining parishes were prescriptively bound to repair; yet when the new bridge was carried away by a flood about the same time as the bridge in question; upon an indictment against the county of *Surrey* for the non-repair of the one half, tried at the sittings in *Middlesex* before Lord *Ellenborough* C. J. and upon another indictment against the county of *Hants* for the non-repair of the other half, tried before *Lawrence* J. at *Reading*, the inhabitants of those counties were respectively held liable for their proportions. The *Glasburne Beck* case (*a*) was decided on the same principle.

Lord Ellenborough C. J. In the case of *Frimley* bridge, the parishes not being bound to repair the bridge, nor the trustees of the turnpike who had erected it for the public benefit, and who had no funds set apart for the purpose of keeping it in repair, it followed necessarily that the county were bound to the repair by the statute of *Hen.* 8. But here the statute gives power to the company to take or alter the old highway for their own purposes, upon condition of leaving another passage as convenient in its room: and if they do not perform the condition, they are not entitled to do the act. It is a continuing condition: and when the company thought proper for their own benefit to alter the highway in the bed of the river, so that the public could no longer have the same benefit of the ford, they were bound to give another passage over the bridge, and to keep it for the public.

(*a*) 5 *Burr.* 2594. and 2 *Blac. R.* 685.

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The KING *againſt* The Inhabitants of the County of KENT.

LE BLANC J. The act which enabled the company to deſtroy the ford, (the doing of which would otherwiſe have been indictable as a nuſance,) *leaving* another paſſage as convenient, empowered and directed them to build and keep the bridge in the place of it.

BAYLEY J. The act empowered the company to amend or alter ſuch bridges or highways as hindered the navigation, *leaving* them or others as convenient in their room: and after altering the bed of the river ſo as to make it no longer fordable, they could not leave another convenient paſſage in the highway there without making and keeping up a bridge. The committee of the proprietors reported, and the company afterwards reſolved, that a bridge was neceſſary at this place as a ſubſtitution for the old road. *Frimley* bridge was built by the truſtees of the turnpike road for the benefit of the public at large: but this bridge was built by a particular company for their own private benefit, in lieu of a ford in the highway, which the public had the uſe of before, and which the company deſtroyed for the benefit of their own navigation.

Per Curiam, Rule abſolute for entering a verdict for the Defendants.

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Friday,
Jan. 2[illegible]th.

An indictment will not lie for conspiring to commit a civil trespass upon property by agreeing to go and by going into a preserve for hares, the property of another, for the purpose of snaring them; though alleged to be done in the night by the defendants, armed with offensive weapons for the purpose of opposing resistance to any endeavours to apprehend or obstruct them.

The KING *against* TURNER and seven Others.

THIS was an indictment for a conspiracy, which stated that the defendants unlawfully and wickedly devising and intending to injure, oppress, and aggrieve *T. Goodlake*, of *Letcombe Regis* in the county of *Berks*, Esquire, on the 24th of *November*, 50th *Geo.* 3. with force and arms, at *East Challow* in the county aforesaid, unlawfully and wickedly did *conspire*, *combine*, *confederate*, *and agree together*, and with divers other persons unknown, *to go into a certain preserve for hares* at *Letcombe Regis* aforesaid, in the county aforesaid, belonging to the said *T. G.*, without the leave and against the will and consent of the said *T. G.*, to snare, take, kill, destroy, and carry away the hares in the said preserve then being, and to procure divers bludgeons and other offensive weapons, and to go to the said preserve armed therewith for the purpose of opposing any persons who should endeavour to apprehend or obstruct or prevent them in and from carrying into execution their unlawful and wicked purposes aforesaid; and that the said defendants, in pursuance of and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid before had, afterwards, to wit, on the said day, &c., about the hour of 12 in the night of the same day, with force and arms, at *East Challow* aforesaid, in the county aforesaid, unlawfully and wickedly did procure divers large bludgeons, and other offensive weapons, and did go to the said preserve of the said *T. G.* armed therewith, for the purpose of opposing any persons who should endeavour to apprehend, obstruct, or prevent them in and from

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carrying into execution their unlawful and wicked purposes aforesaid. And the said defendants, being so armed as aforesaid, in further execution of their unlawful and wicked purposes aforesaid, then and there did set divers, to wit, 100 snares, for the purpose and with the intent to take, kill, destroy, and carry away the hares in the said preserve then being; in contempt of the king and his laws, to the evil example of others, to the great damage of the said *T. G.*, and against the peace, &c.

After a verdict of guilty, it was moved in the last term, by *Jervis*, to arrest the judgment for the insufficiency of the charge, which was only that of an agreement to commit a mere trespass upon property, and to set snares for hares, and was not an indictable offence, but at most only an injury of a private nature, prohibited sub modo, under a penalty. And 2 *Hawk. P. C. c.* 25. *s.* 4. was referred to. Another objection was taken, that the place where the offence was committed was not alleged with sufficient certainty and precision.

Gleed now opposed the rule, and endeavoured to sustain the indictment upon the authority of 2 *Hawk. P. C. c.* 72. *s.* 2. where it is said that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law; as where several confederate to maintain one another in any matter whether it be true or false. The cases also shew that it is equally an offence to combine to do a lawful act by unlawful means, or to an unlawful end, as to do an act in itself unlawful; as in the instance of workmen conspiring together to raise their wages (*a*), or parish officers conspiring to marry a

(*a*) *The King* v. *The Journeymen Taylors of Cambridge*, 8 *Mod.* 11.

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helpless pauper into another parish, to settle her there and rid themselves of her maintenance (*a*). And in all cases of unlawful conspiracy, the mere unlawful agreement to do the act, though it be not afterwards executed, constitutes the offence; according to *Rex* v. *Armstrong and Others* (*b*), and *Rex* v. *Rispal* (*c*). In this latter case the indictment for conspiring to charge a man with a false fact, and exacting money from him under pretence of stifling the charge, was sustained; though the fact imputed, which was merely that of taking hair out of a bag belonging to the defendant *Rispal*, did not import in itself to be any offence. [Lord *Ellenborough* C. J. All the cases in conspiracy proceed upon the ground that the object of the combination is to be effected by some falsity; insomuch that in *Tailor* and *Towlin*'s case in *Godb.* 444. it was held necessary in conspiracy to allege the matter to be falfe et malitiofe. By the old law indeed the offence was considered to consist in imposing by combination a false crime upon a person. But are you prepared to shew that two unqualified persons going out together by agreement to sport is a public offence?] Modern cases have carried the offence further than some of the old authorities, such as *The King* v. *Eccles and Others* (*d*), where

(*a*) *The King* v. *Edwards and Others*, 8 *Mod.* 320.

(*b*) 1 *Ventr.* 304. (*c*) 3 *Burr.* 1320. and 1 *Blac. Rep.* 368.

(*d*) *M.* 24 *G.* 3. *B. R.* Mr. *Dampierd*'s MS. note of that case (which is also noticed by him in *Willes' Rep.* 583. n. *a.*) states that it came on upon a motion by *Chambre* to arrest the judgment on an indictment for a conspiracy, of which the defendants had been found guilty; which indictment stated that the defendants conspired together *by indirect means* to prevent one *H. B.* from exercising the trade of a taylor. And it was contended that it should have stated the fact on which the conspiracy was founded, the means used for the purpose. And *Rex* v. *How*, 1 *Stra.* 699. *Rex* v. *Munoz*, 2 *Stra.* 1127. and *Rex* v. *Sterling*, 1 *Lev.* 125. were cited. Lord *Mansfield* C. J. The conspiracy is stated, and its object: it is not necessary that the means should be stated. *Buller* J. If there be any objection,

where the defendants were convicted upon a charge of conſpiring together *by indirect means* (not ſtating what thoſe means were) to prevent a perſon from carrying on his trade. And in *The King* v. *Spragge and Others* (*a*), which charged the defendants with a conſpiracy to indict and proſecute *W. G.* for a crime liable by law to be capitally puniſhed, and that in purſuance of ſuch conſpiracy they did afterwards indict him; one of the objections was, that the charge was only of a conſpiracy to indict, not of a conſpiracy to indict *falſely*: but it was overruled.

Lord ELLENBOROUGH C. J. That was a conſpiracy to indict another of a capital crime; which no doubt is an offence. And the caſe of *The King* v. *Eccles and Others* was conſidered as a conſpiracy in reſtraint of trade, and ſo far a conſpiracy to do an unlawful act affecting the public. But I ſhould be ſorry that the caſes in conſpiracy againſt individuals, which have gone far enough, ſhould be puſhed ſtill farther: I ſhould be ſorry to have it doubted whether perſons agreeing to go and ſport upon another's ground, in other words, to commit a civil treſpaſs, ſhould be thereby in peril of an indictment for an offence which would ſubject them to infamous puniſhment.

Per Curiam, Rule abſolute.

(*a*) 2 *Burr.* 993.

jection, it is that the indictment ſtates too much: it would have been good certainly if it had not added, "by indirect means;" and that will not make it bad. Rule diſcharged.

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Friday, Jan. 25th.

DAVIS, Treasurer of the BRISTOL Dock Company, *against* Lady ELIZABETH WILLIAMS, Administratrix of Sir EDWARD WILLIAMS, Bart.

An agreement by several for a subscription to one common fund, such as for making a wet dock at *Bristol*, though several as to each subscriber, only requires one stamp.

An examined copy of the act book in the registry of the prerogative court of *Canterbury*, stating that administration was granted to the defendant of her husband's goods at such a time, is proof of her being such administratrix, in an action against her as such, without giving her notice to produce the letters of administration.

THIS was an action brought to recover the amount of eight different calls under the *Bristol* Dock act 43 *Geo.* 3. *c.* 160., being so many parts of a subscription of 1500*l.* made by the intestate in his lifetime for the purposes mentioned in that act. The declaration stated that Sir *Edward* on the 27th of *August* 1802 *had subscribed to advance* 1500l. for the purpose of raising the necessary sum for completing the works directed to be made by the act, and in respect of such subscription became a proprietor of such works, and an owner of 15 shares in the same; by means whereof he became liable to pay 1500*l.* or such parts as should from time to time be called for by the directors of the company. That Sir *Edward*, being such subscriber and so liable, on the 1st of *October* 1804 died, and *administration of his effects was granted to the defendant*: and by reason of the premises, and of another act of the 46 *Geo.* 3. *c.* 35. for amending and extending the former act, the defendant, as administratrix, became liable to pay as well the said 1500*l.* as a further sum of 35*l.* per share, amounting to 525*l.*, or such parts as should be necessary and called for, &c.; and being so liable, the defendant on the 20th of *November* 1806 promised to pay the said 1500*l.* and 525*l.* And then it stated a call on the last-mentioned day by the directors upon the proprietors of 10*l.* a share, payable on the 8th of *December* then next, the same being deemed necessary, and that the proper notice thereof as set forth in the act

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was given to the defendant. There were other counts ſtating other calls of 10*l.* per cent., and ſome more general counts: to all which the general iſſue was pleaded.

At the trial before *Wood* B. at *Briſtol*, in order to prove the firſt allegation, that Sir *Edward* had ſubſcribed 1500*l.* for the purpoſes of the act, a parchment was produced, beginning — We whoſe names are hereunto ſet agree to ſubſcribe the ſums againſt our names, &c.: and containing many names of ſubſcribers, amongſt which Sir *Edward*'s ſubſcription for 15 ſhares of 100*l.* each was proved: and his name is alſo mentioned as a ſubſcriber in the dock act, (declared to be a public act,) but without mentioning for what ſum. This inſtrument was ſtamped with one 30*s.* and ſix 20*s.* ſtamps; and a witneſs was called, who proved that he applied to the commiſſioners of ſtamps, after the ſignatures were ſubſcribed, to put the proper ſtamps upon it, and that thoſe ſtamps were then put upon it as the proper ſtamps; and the following receipt was alſo written thereon. "Stamp office. Received the 31ſt of *Auguſt* 1810, of Mr. *Tarrant*, the ſum of 10*l.* for marking the within agreement with a 30*s.* ſtamp and ſix 20*s.* ſtamps: at the ſame time 7*l.* 10*s.* 0*d.* for the ſtamps: received for *Jos. Smith* Eſq., receiver-general of his majeſty's ſtamp duties.

N. Pilkington, P. R. G.
Wm. Rooke, pro Comp^r^."

It was objected, on the part of the defendant, that there ought to have been a ſtamp for every perſon's name in the ſubſcription; that the contract of each ſubſcriber with the other, as to his own ſhare, was ſeveral and not joint; and that the few ſtamps on the parchment in compariſon with the number of ſubſcribers, not appropriated at the time to any particular ſubſcriber, could not

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be so applied on the present occasion. This point was saved by the learned Judge for the consideration of the Court; and the cause proceeded.

To prove another allegation in the declaration, that the defendant was administratrix of Sir *Edward*, a paper was produced, which was proved to be a true copy of the act in the registry of the prerogative court of *Canterbury*. The witness to whom it was delivered had applied at the office to have a copy of the letters of administration; whereupon this extract was made by order of Mr. *Ellis*, acting as deputy registrar's clerk, from the register of administrations in that office; which was examined with and proved to be an exact copy from the book, excepting the words at the top of the signatures: and Mr. *Creswell* signed it in the witness's presence.

" Extracted from the registry of the prerogative court " of *Canterbury*.

" *October* 1804.

" Sir *Edward Williams*, Bart. on the first day.

Sworn under 500*l.* *J. E.*	" Administration of the goods " chattels and credits of Sir " *Edward Williams* Bart. late " of *Langord Castle* in the coun- " ty of *Brecon*, and of *Clifton* " in the county of *Gloucester*, " deceased, was granted to " Dame *Elizabeth Williams*, wi- " dow, the relict of the said " deceased, having been first " sworn by commission duly to " administer.	*April.* *October.*

Geo. Gostling.
Nath. Gostling. } Deputy Regrs."
R. C. Creswell.

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It was again objected on the part of the defendant, that this was not evidence of administration granted, without notice to the defendant to produce the letters of administration, which had not been given. To which it was answered by the plaintiff's counsel, that it was the act of the Court granting the administration, which was evidence per se of administration granted, without producing or giving notice to produce the letters themselves; and they cited *Elden, Administrator,* v. *Keddell* (a), where the original book of acts, directing letters of administration to be granted to the plaintiff, was held to be evidence of his title; and this being a public document, an authenticated copy of it is equally evidence. This point was also saved for the opinion of the court: and thereupon, by consent, the plaintiff was nonsuited, with leave reserved to him to move to set aside the nonsuit, and enter a verdict for 1200*l.*

This was moved accordingly by *Lens* Serjt. (with *Dampier*) in the last term, who obtained a rule nisi: and when the case was called on in the peremptory paper of this term, *Burrough*, who appeared for the defendant, admitted that neither of the objections taken at the trial could be supported. The first, as to the stamp, was over-ruled in a case of *Baker* v. *Jardine*, in this court, in *Trinity* term 1784 (b), where it was held that an agreement

(a) 8 *East*, 187.

(b) The following is *Mr. Burrough's* note of the case referred to, as to this point. *Baker* v. *Jardine*, *Tr.* 1784, *B. R.* This case was tried at the Spring assizes 1784, at *Exeter*. The plaintiff and several others, who had also brought similar actions for money had and received, were mariners and part of a crew of a privateer, who had joined in a bill of sale to the defendant of their prize-money; and on a supposition that the bill of sale was void, they brought their actions to recover back their respective

An assignment of the prize-money of several seamen on board a privateer, being payable out of one fund, only requires one stamp.

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ment relating to the prize shares of different persons, though several as to the share of each, yet as payable in respect only

respective shares. Three questions arose at the assizes, one of which only was a question of fact; whether the bill of sale were fraudulently obtained or not: this went to the jury, who found for the defendant. The other points were of law, and were left to the decision of the Court, on motion. The first of these was, Whether by the stat. 20 *G.* 2. *c.* 24. *s.* 4. (1) the bill of sale was prohibited. The second was, Whether there ought to have been more stamps than one on the bill of sale by 12 *Ann. stat.* 2 *c.* 9. *s.* 24. The question of fact having been by agreement of the parties left to the jury, and they having agreed to be bound by the verdict as to the fact, the motion to set aside the verdict for the defendant, and enter a verdict for the plaintiff, was made only on the points of law.

This cause first came on in *Easter* term. On the part of the defendant, on shewing cause, it was contended that as this was relative to one thing only, that is, to the fund of the prize, the statute did not require that it should have more than one stamp. That a release of a fee and an assignment of a term were often found in one instrument; yet it was never usual to have more than one stamp. The same as to joint and several bonds. On the contrary, for the plaintiff it was urged, that to admissions to corporations there must be as many stamps as parties admitted. *Rex* v. *Reeks*, 2 *Stra.* 716. And that this was like the case of *Gilby* v. *Lockyer*, *Dougl.* 217. where several causes of action being inserted in one affidavit against several defendants, it was held to be void. As to the other point, it was contended for the defendant, that the clause of the act was expired; that it expired at the end of the war, which concluded at the treaty of *Aix la Chapelle.*

The Court desired that it might come on again at a future day, and in the mean time that the practice might be inquired of at the stamp-office. On the day appointed,

Rocke Serjt. and *Batt*, for the defendant, said that under the stat. 12 *Ann st.* 2. *c.* 9. *s* 21. 24. where there was only one fund out of which the parties claimed, the office required only one stamp That this was so as to releases and letters of attorney to creditors. That in many cases mortgagor and mortgagee join in the same conveyance and convey their

(1) By that clause of the act, to prevent impositions on seamen, &c. and for better encouragement of seamen, &c. to continue in his Majesty's service, it is enacted that every contract, &c. and assignment whatsoever of any share of prize taken from the enemy by any of his majesty's ships or vessels of war, or by any merchant ship employed in his majesty's service, or having letters of marque, &c. shall be void to all intents and purposes whatsoever.

respective

only of one entire fund, was only chargeable with one ſtamp (a). Then as to the other objection, the ſame evidence

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(a) See *Doe* v. *Day*, poſt. 241.

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reſpective intereſts: ſo do tenants for life and remainder-men; and yet there is but one ſtamp uſed.

BULLER J. Can you diſtinguiſh this caſe from the caſe of the affidavit to hold to bail?

Lord MANSFIELD C. J. By this inſtrument it appears as if they were diſtinct deeds. The receipts are all diſtinct.

BULLER J. The receipts ſhew that in the underſtanding of the parties they are diſtinct aſſignments. The only caſes are of affidavits to hold to bail and admiſſions to offices.

Lord MANSFIELD C. J. The ſtatute does not ſay one deed, but where more than any one thing, &c.

BULLER J. Suppoſe for a moment that it is clear the act meant to raiſe a duty on every deed; and that this operates as three deeds, becauſe there is a diſtinct conveyance from each: though by the words of the act the ſtamp-duty is to be paid on every deed, yet if the intereſt of the parties relates to one thing, then only one ſtamp is requiſite. If ſo, then if the captain and all the crew had joined, there had been only one ſtamp neceſſary.

Lord MANSFIELD C. J. To be ſure they might have joined in naming one agent. The conſequence, if it were otherwiſe, would be extravagant as to the revenue; and it would ſhake men's titles.

WILLES J. There have been abundance of theſe aſſignments: I ſhould be glad to know whether it hath been uſual to have more than one ſtamp.

Lawrence, alſo for the defendant, cited *Jones*, d. *Rayner* v. *Saundys and Others*, *Barnes*, 463. There the queſtion was, Whether a bond, in the condition whereof a mortgage deed was contained, ought to have had two ſtamps: and the Court held not: and in delivering their opinion mentioned the caſes of bargain and ſale, leaſe and releaſe, demiſe and redemption, mortgage with covenant to pay the money, as conſtantly charged with the ſingle duty only.

[*Morris*, contrà.]

Lord MANSFIELD C. J. This caſe is very material. It is the ſame thing: one deed conſiſting of ſeveral parts, illuſtrated by all the ſteps to a common recovery, which is conſidered as one tranſaction.

Cur. adv. vult.

[The caſe came on again in *Trin.* term 1784, upon the queſtion ariſing on the ſtat. 20 *G.* 2. *c.* 24.: whether that clauſe extended to *privateers'* prize-money; as well as upon the other queſtion raiſed on that ſtatute,

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dence has been held to be sufficient in other cases; and he referred to *Bull. Ni. Pri.* 246. and the cases there cited, and to *Elden* v. *Keddell*, 8 *East.* 187 (*a*).

The Court agreed, that neither of the objections was well founded, and directed the nonsuit to be set aside, and a verdict to be entered for the plaintiff for 1200*l*.

(*a*) In addition to the cases referred to in that report may be added another, of *Ray and Another*, *Assignees of Larkin*, *a Bankrupt*, v. *Clerk and Another*, *London* sittings after *Hilary* (or *Easter*) 1775, before Lord *Mansfield* C. J. MS. of *Buller* J. The petitioning creditor was the administrator of the obligee of a bond given in 1765, and the letters of administration were in *January* 1774. The plaintiffs proved the administration by an examined copy on stamps of the entry in the books of the ecclesiastical court, without any evidence of inquiry after the letters of administration; the plaintiffs, as assignees, being strangers to them: though Mr. *Wallace* (for the defendant) repeatedly called on them to prove the petitioning creditor's debt. Verdict for the plaintiffs. [Other questions arose in the same case not material to this purpose.]

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statute, whether it were expired: on which Lord *Mansfield* C. J. and the rest of the Court afterwards delivered their opinions (as appears by the MS.) that the act expired with the then war; and that it did not intend to include privateers: and without taking any further notice of the question on the stamp, which seems to have been considered as decided on the former occasion, the rule was finally discharged.]

Saturday, Jan. 26th.

Frazer *against* Marsh.

The registered owner of a ship, having chartered her to the then captain at a rent for a certain number of voyages, is not liable for stores furnished to the ship by order of the charterer during the charter-party.

THE defendant became the purchaser of a ship under a sale by the sheriff in *October* 1805; and an assignment of it to the defendant was prepared in the same month, but the sheriff would not execute it till the whole of the purchase-money was paid, which was not till 1810. The defendant however was put into possession of it immediately after the sale, and got it registered in his own name; and afterwards by a charter-party he

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he let the ſhip for a given number of voyages at a certain rent to *Walker*, who was then the captain of her, and who afterwards ordered ſtores for the uſe of her, which were ſupplied by the plaintiff, for the value of which this action was now brought againſt the regiſtered owner. But Lord *Ellenborough* C. J., before whom the cauſe was tried at *Guildhall*, nonſuited the plaintiff; being of opinion that during the exiſtonce of the leaſe the relation of maſter and owner ceaſed to ſubſiſt between *Walker* and the defendant, and that the ſtores muſt be taken to be ordered on *Walker*'s own account.

Park now moved to ſet aſide the nonſuit, and referred to *Pariſh* v. *Crawford* (*a*), before Lord C. J. *Lee*; where the owner of a ſhip chartered by him to another was held liable to the owner of goods taken on board by the charterer, who received the freight, but did not deliver the goods. Though in another caſe of *James* v. *Jones and Others* (*b*), Lord *Kenyon* C. J. is ſtated to have been of a different opinion, and that the liability of the original owner was transferred to the charterer pro hac vice. [Lord *Ellenborough* C. J. The caſe of *Vallejo* v. *Wheeler* (*c*), alſo proceeded on the ground that the charterer was to be conſidered as owner pro hac vice.] That was as between him and the captain upon a queſtion of barratry: but third perſons have a right to hold the regiſtered owner liable to them for the acts of the captain.

Lord ELLENBOROUGH C. J. The regiſter acts were paſſed diverſo intuitu: but to ſay that the regiſtered

(*a*) Shortly reported in 2 *Stra.* 1251., but more fully in *Abbott* on Merchant Ships and Seamen, 22.

(*b*) *Ib.* 24. and 3 *Eſp. N. P. Caſ.* 27. (*c*) *Cowp.* 143.

owner,

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owner, who divests himself by the charter-party of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by the order of the captain during the time, would be pushing the effect of those acts much too far. The question is, whether the captain in this instance who ordered the stores, were or were not the servant of the defendant who is sued as owner? And as they did not stand at the time in the relation of owner and master to each other, the captain was not the defendant's servant, and therefore the latter is not liable for his act. There is a late case in the Court of C. P. (a), where the mere entry of the defendants' names, as owners, in the register book was held not to be even primâ evidence to charge them as such with stores delivered for the use of the vessel by the order of another.

Grose J. agreed.

Le Blanc J. An owner would have the appointment of the captain; but the defendant had no right to appoint the captain under the charter-party.

Bayley J. The captain in this case ordered the stores as owner.

Rule refused.

(a) *Frazer* v. *Hopkins and Another*, 2 *Taunton*, 5.

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DOE, Lessee of Sir JOSEPH COPLEY, Bart. *against* DAY.

Saturday, Jan. 26th.

Where an instrument contains a written contract of demise in its general terms, with a several operation in respect to the different tenants who sign it for different estates at the different rents set against their signatures, and one stamp only appears upon the paper, it is matter of evidence to which contract such stamp applies; and the circumstance of juxta position of the stamp to the defendant's signature, which stood untouched, while all the other names appeared scored through with pencil lines as if by way of cancellation; and the date of the stamp-office receipt for the stamp and penalty, which shewed that it had been affixed after the action brought, and recently before the trial; and there being no evidence of a dispute with any other tenant which could make the stamp necessary for another purpose; are evidence that it was intended to be and was applied to the contract with the defendant; in which case the paper was evidence for this purpose.

THIS ejectment was brought to recover a farm in the parish of *Sprotbough* in *Yorkshire*. The lessor of the plaintiff laid his demise on the 1st of *March* 1810; and at the trial before *Chambre* J. at *York*, proved the receipt of rent from the defendant, and a notice served on him upon the 29th of *July* 1809, to quit at *Candlemas*. He also proved by parol testimony, that the premises held by the defendant consisted of a small dwelling-house, outbuildings, and 52 acres of land; that the defendant had entered on the whole at *Candlemas*, and held from that time; which was the general time of holding in that country: but the same witness also proved on cross-examination, that it was common to enter on the land at *Candlemas*, and *on the house and the other premises at* May-day. Upon which it was objected (a) by the defendant's counsel, that the demise being laid before *May-day*, was too early: to obviate which objection in fact the plaintiff then produced a written agreement, intitled, "Memorandum of an agreement made this 6th of *August* "1805, between Sir *Lionel Copley*, Bart. (the predecessor "of Sir *Joseph*,) and his several tenants whose names are hereunto subjoined, as follows," &c. Then followed the terms of letting; by which it appeared, inter alia, that

(a) Vide *Doe* v. *Spence*, 6 *East*, 120. and *Doe* v. *Howard*, 11 *East*, 498.

the

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the lettings to the refpective tenants were all from *Candlemas* for one year, and fo from year to year, till fix months' notice were given by either party to quit: and the agreement concluded with three columns of tenants' names, with the refpective rent expreffed againft each tenant's name; and in one of thofe columns where the defendant's name appeared, a ftamp was affixed in this manner:

30*s*. Stamp.

£.10 Penalty.
J. B.

	£.	s.	d.
"For *Thos. Simpfon*, *Anthony Simpfon*,	30	0	0
George Mann,	343	0	0
Robert Day (the defendant),	115	0	0

And on the back of the memorandum was written, "Stamp office, *Auguft* 2, 1810. Received of Mr. *Burroughs* ten pounds for marking this inftrument with a "thirty fhilling ftamp. At the fame time received one pound "ten fhillings for the ftamp. Received for *Jofeph Smith*, "Efq., receiver-general of his majefty's ftamp duties:" and this was fubfcribed by certain official fignatures. Upon the face of the inftrument, as it was exhibited at the trial, it alfo appeared, that black lead pencil lines were fcored through all the names and fums except the fignature of the defendant *Robert Day*, and the rent oppofite to his name. The reading of this inftrument was objected to, on account of its containing fo many diftinct agreements with different tenants for feveral and independent lettings, and having only one ftamp. This objection, as well as the firft, was faved by the learned

 Judge;

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Judge; and the plaintiff took a verdict, subject to the opinion of the Court on both points.

These points were brought in revision before the Court in the last term by *Topping*, upon a motion to set aside the verdict and enter a nonsuit: at which time he founded the first objection upon the evidence arising upon the cross-examination of the witness, that it was common to enter on the land at *Candlemas, and on the house and other premises at* May-day; not supposing that the actual entry of the defendant upon the whole at *Candlemas* had been in proof: but after that fact was read, as stated above, from the judge's report, that objection was disposed of. Upon the last point he relied on *The King* v. *Reeks* (a), which was lately referred to in the case of *Powell* v. *Edmunds* (b). And upon shewing cause against the rule in this term, the only questions were, whether upon the face of the instrument, or by evidence, it distinctly appeared, that the single stamp affixed were intended to be appropriated exclusively to the signature of the defendant and his agreement with the lessor; and if so, whether that could legalize the evidence of an instrument containing the same words of contract with many different persons, reddendo singula singulis; which was stated to be in fraud of the revenue.

The case was now shortly spoken to by *Cockell* and *Rough* Serjts., on the part of the plaintiff, who produced an affidavit of the intended appropriation of the stamp to the defendant's contract, at the time it was affixed, and verifying that the pencil lines were then drawn through the other names. But the Court considered the burthen of the argument as lying on the other side.

(a) 2 *Stra.* 716. and 2 *Ld. Ray.* 1445. (b) 12 *East*, 6.

Topping

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Topping and *Richardfon* were then heard for the defendant, and *Dampier* (in the abfence of the *Attorney-General*) on the part of the ftamp office. The two former denied that any thing appeared on the face of the inftrument to fhew that the ftamp was exclufively appropriated to the defendant's fignature in the lift of tenants: the middle of the ftamp appeared more immediately oppofite the name of *George Mann*, and was at leaft as applicable to the contract with him as to that with the defendant. It ought decifively to appear either upon the face of the inftrument, or by fome official recognition, that the ftamp was intended by the office to be affixed to the particular contract: for otherwife it might have been made to ferve in the firft inftance for *George Mann*'s contract, or it may be made to ferve for it upon fome future occafion. The defect of fuch intrinfic evidence cannot now be fupplied by the affidavit, that pencil marks were drawn through the reft of the inftrument at the time; for this would open a wide door to fraud: the evidence ought to have been proved at the trial for the jury to have decided upon the fact. *Dampier* faid, that it was optional in the commiffioners of the ftamp office to affix the ftamp in thefe cafes in refpect of a particular contracting party, upon payment of the penalty: but he agreed, that this ought to appear with certainty, and that a cancellation of the other names by pencil marks, as thefe might afterwards be gotten rid of, was not an effectual check againft fraud upon the revenue. And they all argued, that mere juxta pofition in this cafe, applying as it did equally to two of the names, was not a decifive criterion of the exclufive appropriation of the ftamp to the one. The defendant's counfel contended further,

upon

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upon the authority of *The King* v. *Reeks* (a), that this instrument being entire in its terms, but several in its operation, and requiring as many several stamps as contracts to give it entire effect, could not be given in evidence against any one of the contracting parties by the force of one stamp only; for that by law the single stamp was no more applicable to one of the contracting parties than to another. That juxta position alone to the defendant's name, supposing that to be the fact, was not sufficient in law to give it an exclusive appropriation to the defendant's contract. And they distinguished this from the case of *Powell* v. *Edmunds* (b), where the contracts for the several lots with the different purchasers were quite distinct, the one from the other, though happening to be written upon the same piece of paper: and the exclusive appropriation of the stamp to the one contract in question was manifest upon the face of it.

Lord ELLENBOROUGH C. J. On the application of the stamp to the defendant's name, and to the contract with him, and of the admissibility of the instrument in evidence for this purpose, I have no doubt: though I should certainly have very much hesitated had I been in the situation of a commissioner of stamps, before I had applied the single stamp to the defendant's name in a case so circumstanced. For here is a person of large landed property, who puts all his lettings to his several tenants, many in number, and to a considerable amount in value, upon one paper, to which all their names are subscribed, though the contract with each is entirely distinct in its nature, and in respect to the property which is

(a) 2 *Ld. Ray.* 1445. (b) 12 *East*, 6.

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Doe, d. ſſee of Copley againſt Day.

the ſubject-matter of it: and this contrivance is apparently adopted for the purpoſe of avoiding payment of the ſeveral ſtamp duties which would have been required for ſo many ſeparate contracts, and thereby eſcaping from bearing his fair ſhare of the burthens of the country. I cannot therefore help wiſhing that ſuch an attempt had failed. But here is the inſtrument with the ſtamp affixed upon it, and we have only to look at its legal effect. The plaintiff had at firſt given general evidence ſufficient to entitle him to recover: but not wiſhing to reſt upon that, he afterwards produced this inſtrument, as the beſt evidence of the contract by which the tenant held. If indeed the inſtrument had been required to ſubſtantiate the ſeveral contracts with the different tenants, no doubt there ſhould have been a ſtamp affixed to each, although the ſame terms of agreement applied to all: one ſtamp has been only held to be ſufficient upon an inſtrument affecting the ſeparate intereſts of ſeveral, where there has been a community of the ſame ſubject-matter as to all the parties (*b*). But here it ſufficiently appears from the circumſtances of the caſe, as well as from the affidavit which has been read, that the ſtamp was meant to be applied to the defendant's ſignature. The affidavit ſtates, that at the time when the paper was preſented at the office for the purpoſe of being ſtamped, all the other names were ſtruck through with pencil lines; in which ſtate it was in fact preſented at the trial. But without the affidavit, there is the juxta poſition of the ſtamp to connect it with the defendant's name; and in a multitude of inſtances, juxta poſition alone will connect one writing, &c. with another; as

(*a*) It is probable his Lordſhip had in view the caſe of *Baker* v. *Jardine*, cited ante, 235. in *Davis* v. *Williams*.

in

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in receipts for dividends, entries in the filazer's book, &c. But here there are other circumstances to connect them; such as the pendency of this suit at the time the stamp was affixed, and there being no other suit pending with any other tenant, which could bring the validity of the instrument in question. Then the receipt of the stamp officer shews that it was affixed at a time recently before the trial. Coupling those circumstances, therefore, with the juxta position of the stamp to the defendant's name, there appears to have been sufficient evidence to connect the one with the other.

GROSE J. agreed in the same opinion.

LE BLANC J. We are not called upon to decide, whether it were necessary for the plaintiff to produce this instrument in evidence at the trial; nor how far, whether valid or not, the production of it put out of the question the effect of the prior evidence adduced by him, as stated in the learned Judge's report. The plaintiff produced it as the best evidence of the time from which the tenancy commenced; and the objection was taken that it was not properly stamped; and I find no fault with such an objection, which goes to support the obligation of the revenue laws. But the landlord having made his several agreements with all his tenants on the same piece of paper was no bar to his application to the stamp office to affix a stamp upon any one of them which he pleased; though the commissioners were to judge whether, in the exercise of their discretion, they would affix the stamp upon it. They have, however, thought proper to do so; and there was sufficient evidence at the trial that they meant to apply the single stamp to the de-

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Doe, Lessee of Copley against Day.

fendant's name: for not only is the stamp put opposite to his name, but it appears from the receipt of the stamp office, that the money was paid for affixing it on the 2d of *August*, which shews that the paper was stamped on that day; and that was but a short time before the trial, and must have been after the action commenced; which will account for its application to the contract made with the defendant: the instrument also, when produced in evidence, appeared to be cancelled with black lead pencil lines as to every other name besides that of the defendant; and it did not appear that it was not so cancelled at the time when the stamp was affixed upon it. It appears, therefore, that the instrument was properly received in evidence for this purpose.

Bayley J. I lay the affidavit now offered on the part of the plaintiff out of the case, because the only question is, whether the judge properly received the evidence of the instrument at the trial. The paper contains a variety of independent contracts with different tenants, though under the same general terms of holding, and there is one stamp put upon it rather more opposite to the name of the defendant than of any other person. But besides the juxta position, there is the circumstance, that the only dispute of which we have heard respecting the instrument is between this defendant and his landlord; and the stamp appears by the date of the receipt to have been put upon it just before the assizes, when it might be called for in evidence; and the receipt shews that the penalty was paid for affixing it. This was fair evidence to shew, that the single stamp was meant to be applied to this particular contract, and not to any other.

 Lord

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Lord ELLENBOROUGH C. J. then suggested that it would be more convenient and desirable for the future, if the commissioners in cases of this kind, where they thought proper to affix a single stamp, would direct their officers to insert in their receipt the name of the particular person for whom the application was made.

Rule discharged (*a*).

(*a*) See the case stated by *Ashhurst* J. in *Gilby* v. *Lockyer*, *Dougl.* 217.

KNOWLES and Others *against* MICHEL and Another.

Saturday, Jan. 26th.

An admission by a defendant, that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, will support a count upon an account stated, though not for goods sold and delivered.

THE plaintiffs declared in assumpsit upon the common count for goods sold and delivered, the money counts, and upon an account stated. At the trial before *Graham* B. at *York*, it was proved, that the plaintiffs had sold to the defendants some standing trees, which the defendants afterwards procured to be felled and taken away: and when *Michel* was served with the writ, both the defendants admitted that they had bought the trees jointly for nine guineas; but *Michel* said that he would pay no more than one half. On this evidence it was objected, that the action was not maintainable; the contract being for standing trees which were part of the realty. To which it was answered, that the acknowledgment of the price to be paid for the trees, made after they were felled and applied to the use of the defendants, was sufficient to sustain the count on an account stated; though there was no other item of account between the parties. The plaintiff however was nonsuited; but the

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KNOWLES *against* MICHEL.

learned Judge gave him leave to move to set the nonsuit aside, and enter a verdict for the nine guineas, if the Court thought that the evidence would sustain that count, which he inclined at the trial to think that it would not.

Littledale and *Skirrow* obtained a rule nisi for this purpose in the last term; against which *Scarlett* now shewed cause; and urged shortly, that an admission of money due on a single contract between parties was not evidence of an account stated, which implied different dealings between them. But

The Court were clearly of opinion, that this was sufficient evidence to sustain the count. And Lord *Ellenborough* C. J. said, that he was in the frequent habit of receiving such evidence at the sittings. If there were an acknowledgment by the defendant of a debt due upon any account, it was sufficient to enable the plaintiff to recover upon the count for an account stated.

Rule absolute.

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BARNES *against* MESSINGER.

Monday, Jan. 28th.

The rector of *Bromfield* parish having, from the year 1765, (as far back as living testimony could carry it) to 1799, received the tithes of a certain meadow called *the Demesne*, lying in a part of the township of *Kelsick, in the parish of Holme Cultram*, without interruption or claim from the rector of that parish, (other parts of *Kelsick* lying in *Bromfield*,) conveyed to the plaintiff in 1799 a messuage and lands *in Kelsick, in the parish of* Bromfield, and also all *tithes* of corn arising *within the township of* Kelsick *aforesaid*, or within the townfields, territories, precincts, *or titheable places thereof*: held that this was evidence against the occupier of *the demesne* meadow, though lying in *Holme Cultram* parish of a title to the tithes in the rector of *Bromfield* before the conveyance to the plaintiff; and that the words of the deed were sufficient to convey them.

THIS was an action on the stat. 2 & 3 *Ed.* 6. *c.* 13, against the defendant for not setting out the tithe of hay in a certain place called *the demesne*. The plaintiff claimed by deed of conveyance of the 2d of *May* 1799, from Mr. *Fleming*, the rector of *Bromfield*, who claimed under the will of Mrs. *Raincock*, by whom and her family the property had been for many years enjoyed. The demesne meadow was proved to be *in the parish of Holme Cultram, and not in that of Bromfield*; but it was also proved to be *in the township of Kelsick*. And it was shewn in evidence by oral testimony, that for 46 years back the lessees in succession of the tithe under Mrs. *Raincock* and Mr. *Fleming* had received tithe of the defendant for this meadow called *the demesne*, till about the period of the plaintiff's purchase, when the defendant refused to pay it; and it did not appear that any had been paid by him after the conveyance to the plaintiff. The last person who rented the great tithes of *Kelsick*, together with certain lands there, from the *Raincock* family, was *Henry Nielson*, who had first taken the farm and tithes of Mrs. *Raincock* in 1784, and continued to hold them under lease from Mr. *Fleming* down to 1807, paying his rent for the last eight years to the plaintiff; and he received the tithes of *the demesne* from the defendant from the time of his first leasing them till 1799. This was held by *Graham* B., before whom the cause was tried at *Carlisle*, to be sufficient evidence that the title to the tithes of

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this place, though lying in another parish, and not in *Bromfield*, was in those from whom the plaintiff claimed: as a portion of tithes might be claimed and enjoyed without reference to parochial bounds. The question then turned upon the terms of the deed of conveyance to the plaintiff of *May* 1799, whether they were sufficient to include these tithes. By that deed Mr. *Fleming* conveyed to the plaintiff a certain "messuage and lands, "&c. lying *in* Kelsick, *in the parish of* Bromfield, *or* "within the townfields, territories, and precincts there-"of, and also all their or one of their tithes of corn "and grain, and tithes of hay, yearly growing, arising, "&c. *within the township of* Kelsick *aforesaid*, *or within* "*the townfields*, *territories*, *precincts*, *or titheable places* "THEREOF; all which premises are now in the occu-"pation of *Henry Neilson*, as farmer thereof, together "with houses, &c., and all rights, members, and ap-"purtenances held, used, or enjoyed as part, parcel, "or member thereof." It was insisted by the defendant's counsel at the trial, that under this deed the plaintiff's claim must be confined to "the township of *Kel-*"*sick*, *in the parish of* Bromfield;" and that *the demesne* being in *Holme Cultram parish*, the defendant was liable to the rector of that parish for the tithes of it. [No evidence however was given of any such claim by any other person.] And they further relied upon a covenant contained in the same deed by Mr. *Fleming*, to levy a fine of lands, tithes, and hereditaments in the parishes of *Parith*, *Brigham*, and *Bromfield*, as shewing that nothing was intended to pass but what was in one or other of those parishes. The learned Judge left the case to the jury on the evidence, that the tithes of *the demesne* meadow had been taken for so many years without denial

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or dispute by those under whom the plaintiff claimed, until his purchase 10 or 11 years ago, and on the want of evidence since that time that the rector of *Holme Cultram* or any other person had claimed them. And he thought that the words of description in the deed, "within the township of *Kelsick* aforesaid, or within the "townfields, territories, precincts, or *titheable places* "*thereof*," were sufficiently large to let in the evidence, that there were other titheable places belonging to *Kelsick* not within the limits of that township or the parish of *Bromfield*; and that as the deed conveyed all the grantor's tithes within that description, the fine, if levied, might operate according to that intention. The jury accordingly found a verdict for the plaintiff.

A motion was made for a new trial in the last term, which now came on to be argued; when it was admitted by *Topping* and *Littledale*, in support of the rule, that the receipt of the tithes for the demesne meadow by Mr. *Fleming* and the *Raincock* family, from whom he claimed, from 46 years ago down to the period of the plaintiff's purchase in 1799, was evidence of a title in them to those tithes in some right or other: but they denied that those tithes passed to the plaintiff by the deed of conveyance from Mr. *Fleming*, which was confined to tithes "in "*Kelsick, in the parish of* Bromfield;" whereas the demesne meadow was stated to be "in *Kelsick, in the parish* "*of* Holme Cultram." And they argued that the subsequent words, "tithes arising within the township of *Kelsick aforesaid*, or *within the titheable places thereof*," did not carry the description further; for the words *aforesaid* and *thereof* still referred it to the parish of *Bromfield*: for there can be no tithes appertaining to a township as such.

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such. That this was the true meaning of the deed, they said, was further evinced by the covenant to levy the fine of tithes, &c. in the parishes of *Parith*, *Brigham*, and *Bromfield*, not including any tithes *in* Holme Cultram *parish*. And *Dyer*, 84. *b.* (84) and *Gwillim's Cases*, 119, vol. i. were referred to on moving for the rule.

Cockell Serjt., and *Holroyd*, contrà, relied on the words of the deed conveying the tithes arising *within the township of* Kelsick, &c. *or the titheable places thereof;* which did not confine it to such part of the township of *Kelsick* as lay within the parish of *Bromfield:* and here the evidence was, that the demesne meadow was in *Kelsick;* and the fact of the tithes of that meadow having been always received, as far as memory could trace, by the lessee of the *Kelsick* tithes under the rector of *Bromfield*, shewed that it was one of the titheable places of *Kelsick*, though out of the parish of *Bromfield:* and as such it was expressly conveyed to the plaintiff. And the covenant to levy the fine would not alter the effect of the words of conveyance, especially where it was the intention of the parties to pass these tithes, which were not even claimed by any other person.

Lord ELLENBOROUGH C. J. The question is, whether as against a stranger (for such the defendant may be taken to be,) who does not set up any other claim of title to the tithes of the meadow, proof that the rector of *Bromfield* had been in the constant receipt of those tithes for thirty-three or four years, though arising in another parish, were not sufficient evidence of his right to take them. And if so, the next question is, whether the words in the deed of conveyance from the rector to the plaintiff

plaintiff will not carry those tithes. If the description of *Kelsick aforesaid* were confined, as the defendant's counsel would have us read the deed, to such part of *Kelsick* as lay within the parish of *Bromfield*, the question would still be, whether, if tithes arising in one parish have always been received by the rector of another, they may not strictly be considered as arising within the *titheable places thereof*: and here the words are, " within the township of *Kelsick* aforesaid, or within the town-fields, territories, precincts, *or titheable places thereof*. But here it was proved, that the *demesne* meadow lay *in Kelsick*, which is expressly within the words of the conveyance, though lying in another parish than that of *Bromfield* before named.

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Per Curiam, (absent LE BLANC J.)

Rule discharged.

RAMA CHITTY *against* HUME.

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In an action on a bond given 12 years ago in the *East Indies*, where the subscribing witness resided, the defendant having first caused great delay to the action by insisting on oyer of the original, instead of a sworn copy; which obliged the plaintiff to send for the bond from the *East Indies*; and having then, by leave of the Court under the statute to plead several matters, pleaded non est factum, solvit ad diem, and solvit post diem; the Court, in consideration of the delay which had already intervened, and of the further delay which might be occasioned by taking the deposition of the subscribing witness in the *East Indies* in proof of the bond; and also upon an affidavit that part payments had been made on the bond by the defendant since his return home, and recently before the action brought, rescinded the rule for pleading double, in order to make the defendant elect to stand either upon his plea of non est factum, or on his pleas of payment at and after the day.

AN application was made in the last term to discharge a rule before obtained by the defendant in the common form for pleading double; for the purpose, as it was stated, of driving him to make an election of one or other of his pleas. It was an action brought some time ago on a bond for a large sum of money executed by the defendant in the *East Indies*, where the money was advanced in 1798. The defendant had first craved oyer of

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the bond, which was endeavoured to be refifted by the plaintiff, on the ground that the bond was in the *Eaft Indies*, and that great delay would be occafioned by giving oyer of the original; and therefore he defired of the Court to fuffer a fworn copy to be given in oyer: but as they thought that could not be done, the plaintiff was obliged to fend to the *Eaft Indies* for the original; and a confiderable delay took place in confequence of it. After oyer was given, the defendant, under the rule to plead double, pleaded non eft factum, folvit ad diem, and folvit poft diem: for difcharging which the prefent rule was obtained; which was fupported by an affidavit, that the defendant had made payments on account of the bond, fubfequent to his return to this country from the *Eaft Indies*, long after the bond was due, and within a fhort time before the action was brought.

The Attorney-General now ftated, on the part of the plaintiff, that though in ordinary cafes the Court might fuffer thefe pleas to ftand together; yet it being obvious that they were in themfelves inconfiftent; and as great delay had already intervened fince the action was brought, the Court, who had a difcretion vefted in them by the ftatute to allow a defendant to plead double, which without their leave he had no right to do, would prevent him from making a vexatious and oppreffive ufe of that permiffion, againft the manifeft juftice of the cafe. That it appeared by the affidavit that the witnefs to the bond was in the *Eaft Indies*; and if the defendant ftood upon his firft plea of non eft factum, it would be neceffary for the plaintiff to apply for a mandamus to examine the witnefs there, and the defendant would gain the benefit of fo much longer delay: but in that cafe it feemed rea-

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ſonable not to ſuffer the other pleas to ſtand; and therefore he ſuggeſted, that the defendant ſhould be required to elect whether he would ſtand on the plea of non eſt factum, or on the two other pleas of payment at and after the day.

Holroyd oppoſed the rule on the general ground, that there was no ſufficient circumſtance in this caſe to take it out of the common courſe of this court, which allowed the practice of pleading pleas of this deſcription together, as a matter of courſe in the firſt inſtance, without entering into an examination of their conſiſtency, as is done by the Court of Common Pleas upon a rule to ſhew cauſe in the firſt inſtance: though he admitted that this Court would interfere to correct an improper uſe of the leave to plead double, if a ſpecial and ſtrong caſe were made out.

But *The Court*, after ſome conſideration, ſaid, that though the courſe of this Court, as to granting leave to plead double, was different from that of C. B., where it was neceſſary to obtain the ſpecial leave of that Court in the firſt inſtance to plead ſeveral matters, (a practice which *Groſe* J. obſerved was more convenient, and *Bayley* J. ſaid was in the end leſs expenſive than that which prevailed in this Court,) yet this Court, they ſaid, would, under ſpecial circumſtances, afterwards take into conſideration, in the mode now adopted, the propriety of pleading the ſeveral matters pleaded. And they thought that under all the circumſtances of this caſe, it was a proper occaſion for the Court to interfere and put the defendant to his election, whether he would ſtand on the non eſt factum, or on his pleas of payment; one of which

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which latter at leaſt, the plea of payment *at* the day, was diſproved by his own acts ſworn to in the plaintiff's affidavit: and though the defendant was now in *England* he had not denied the matters of that affidavit. In the mean time they made the preſent rule abſolute.

The KING *against* WINTER.

Tueſday, Jan. 29th.

A preſentment by a magiſtrate under the ſtat. 13 *G.* 3. *c.* 78. *ſ.* 24. of a nuſance in a highway, muſt allege the offence to be done againſt the form of the ſtatute; and it is not enough to ſtate that the magiſtrate, *by virtue of the act*, &c. preſented, &c.

THIS was a preſentment preferred at the ſeſſions for the county of *Somerſet;* which, after ſtating the uſual ſtyle of the juſtices at the ſeſſions aſſigned to keep the peace, and to hear and determine felonies, miſdemeanors, &c. ſet forth, that Sir *J. Lethbridge*, Bart., one of the juſtices, &c. aſſigned for the purpoſes aforeſaid *by virtue of an act made in the* 13 Geo. 3. (*c.* 78.) for the amendment and preſervation of the highways, upon his own view doth preſent, that from time whereof, &c. there was and yet is a certain common and ancient footway leading from the village of *Eaſtcombe* within the pariſh of *Biſhop's-Lydiard*, in the ſaid county, towards and unto the pariſh church of the ſame pariſh, for all the ſubjects, &c. on foot to paſs and repaſs, &c. And that *J. Winter* of, &c. on, &c. with force and arms, at the pariſh aforeſaid, in the county aforeſaid, in and along that part of the ſaid common and ancient footway, ſituate and being in a certain cloſe of land called the *Croft*, in the poſſeſſion of the ſaid *J. Winter*, unlawfully and injuriouſly did dig and cauſe to be dug a certain trench (giving the length and breadth,) and the ſame trench ſo dug, &c. in and along the ſaid part of the ſaid common and ancient footway aforeſaid from the ſaid

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1st of *September* 49 *Geo.* 3. until the making of this presentment at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did continue; by reason whereof the said common and ancient footway was greatly damaged, &c.: and concluding to the great damage and common nusance of all the king's subjects, &c. and against the peace, &c. This presentment was removed into this Court by certiorari; and after a verdict of guilty,

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Moore (with whom were *Burrough* and *Dampier*,) moved to arrest the judgment on these grounds: 1st. That the word *footway* is by the stat. 13 *Geo.* 3. c. 78. contrasted with the general description of *highway*; and therefore the jurisdiction to present *highways* given to magistrates by the 24th section does not extend to *footways*. 2dly. That the presentment does not pursue the words of the act, which no where prohibits the digging of a *trench*. 3dly. It is not alleged that the nusance was committed within 15 feet of the center of the highway, without which it is not presentable under the act. 4thly. That part of the footway presented is not said to be within the parish of *Bishop's-Lydiard* in the county of *Somerset*, but is only described as "a certain footway "leading from the village of *Eastcombe* within the parish "of *Bishop's-Lydiard* towards and unto the parish church "of the same parish:" the termini may be in the parish, and yet the nusance may have been committed by the defendant in another parish and county. 5thly. The offence is not charged to be against the statute. The Court granted a rule nisi; but gave no opinion finally upon any of the objections except the last.

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Lens Serjt., *Jekyll*, *East*, and *Gaselee* now ſhewed cauſe againſt the rule, and contended, that though the preſentment did not conclude in formal terms *againſt the form of the ſtatute*; yet alleging, as it did at the beginning, that the magiſtrate *by virtue of the act*, &c. preſented the nuſance, it was a ſufficient reference to the authority under which he acted, and which prohibited the nuſance charged. [Lord *Ellenborough* C. J. The words "by virtue of the act," &c. only refer to the magiſtrate's power to preſent, and not to the offence preſented.] Then there was no neceſſity for alleging the offence charged to be againſt the ſtatute; for it is nothing more than a nuſance at common law, and not an offence created only by ſtatute; though the juriſdiction was firſt given by ſtatute to the magiſtrates to preſent inſtead of indicting it. It was therefore ſufficient to allege that the magiſtrate preſented by virtue of the act. The 24th ſection gives power to the magiſtrates to preſent all offences againſt the act; and ſome of them are of a ſpecial nature created by the act: but the 12th ſection prohibits all nuſances and obſtructions in the highways, contrary to the directions of the act; which are not merely offences againſt the ſtatute, but at common law. In corroboration of their argument they alſo referred to the form of preſentment given in the ſchedule of the act, which does not conclude againſt the form of the ſtatute.

But *The Court*, without hearing any arguments upon the other objections, were of opinion that the preſentment was bad for want of charging the offence to be againſt the form of the ſtatute: the clauſe giving the

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magiſtrate authority to preſent was confined in the terms of it to offences committed and done contrary to the proviſion and intent of the act; and therefore whatever the offence might be, it was only preſentable by a magiſtrate as an offence againſt the act: and as to the form of preſentment given in the ſchedule, it was confined to caſes of non-repair.

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THE KING *againſt* WINTER.

Rule Abſolute.

SHALLCROSS *againſt* JOWLE.

Tueſday, Jan. 29th.

THIS was an action on the caſe brought by the occupier of a farm againſt the leſſee of the great tithes under the warden and fellows of the collegiate church of *Mancheſter*, for not taking away the tithes of corn in *Gorton* pariſh, alleged to be duly and properly ſet out. At the trial before *Graham* B. at *Lancaſter*, it appeared that the plaintiff had crops of wheat and oats in 1809; and the wheat and part of the oats being ripe for cutting on the 21ſt of *Auguſt*, the plaintiff on that day ſent notice to the defendant, who lived a mile and a half off, that he ſhould begin to reap on the 24th, or as ſoon after as the weather would permit; and in fact he began on the 24th, and continued reaping till the whole was finiſhed in about a fortnight. The wheat, when cut, was firſt bound up in ſheaves, which were immediately ſet up in riders; each rider conſiſting of 10 ſheaves, four of which were ſet up on their ends againſt four others,

Corn being titheable of common right in the ſheaf, it is not competent for the farmer, without a cuſtom, after a general notice to the parſon that he ſhould begin to reap on a certain day, or as ſoon after as the weather would permit; (and in fact the reaping continued for about a fortnight) but before tithing, to put all the ſheaves when bound immediately into large ſhocks or riders, conſiſting of 8 ſheaves ſet up on their ends againſt each other, with two covering ſheaves placed roofwiſe on the top, for the purpoſe of protecting the whole againſt bad weather; from which ſhocks the 10th ſheaves were afterwards drawn, without taking the reſt of the ſhock to pieces; and the reſt of the wheat ſhocks were removed from the ground in two hours, and the oat ſhocks in half an hour afterwards: for the parſon has thereby no reaſonable opportunity of comparing the 10th with the other 9 ſheaves, as he is entitled to have: but the corn ought to be tithed in the ſheaf before it is made up into ſhocks or riders.

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and two more were placed roof-wife on the top of the reft, by way of protecting the whole againft weather. Part of the wheat was fit for houfing on the 14th of *September*; and the defendant not having fent any perfon to fee the riders fet up, nor the tithe fet out, the plaintiff fent his fervant on that day to fet out the tithes; and he took one fheaf from each rider, and fet up every two fheaves fo taken one againft the other; and if there were an odd tenth fheaf at the end of the row, he put three together. He tithed the fheaves, as he fwore, fairly and impartially, taking one promifcuoufly out of each rider, without damage, and taking at every tenth fheaf one from the two uppermoft or thatching fheaves. After thus feparating the tithe fheaves, the reft of the wheat was carried away to be houfed in about two hours afterwards. The like was done by the oats on the 22d of *September*; and of thefe, after the tithe fheaves were thus feparated, the remainder was carried off in half an hour. The defendant, objecting to this mode of tithing, never took the tithes away. And the principal queftion made at the trial was, whether this were a legal mode of fetting out the tithes; that is, whether the tithing ought to have been when the corn was bound in fheaves, and before thofe fheaves were fet up in riders; or whether, in the northern counties, where it was urged that the weather was more catching and uncertain than in the middle and fouthern parts of the kingdom, the farmer might lawfully put the fheaves into riders immediately, without giving notice of or waiting for the tithing in that ftage of the procefs, and afterwards draw out the tenth fheaf in the manner proved in this cafe, without firft taking the rider down altogether. Upon this point the learned Judge was of opinion, that this was not a legal mode of

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tithing corn at common law. Corn, he said, was regularly titheable in the sheaf, and the tithe must be set out before it is put into large shocks or riders; though mutual convenience may have introduced a very general practice in the north, of first putting the sheaves into riders. But where such a course of husbandry prevailed, he doubted whether the corn could fairly be tithed except by the tenth rider. For where the tenth sheaf is set out, the parson has an opportunity of comparing it with the other nine sheaves: but if the sheaves be first put into riders, there is no mode of comparison but of the tenth rider with the other nine riders; for the riders are only taken to pieces when the corn is ready to be carried, and that must depend on the weather, or on the judgment of the farmer. The parson in that case must follow the teams of every farmer who is carrying his corn, and perpetual disputes must arise in the choice of the sheaves, the two uppermost of which, or the thatching sheaves, must probably be worse than the others, as there seemed to be no rule for determining with which to begin to count. This opinion was delivered without reference to any custom in the particular parish: and therefore the learned Judge, in answer to an intimation of such a custom by the plaintiff's counsel, said, that if they had any evidence to offer of it he would hear it; though he added, that he should require strong evidence to establish such a custom. But the plaintiff not being prepared to prove more than that the defendant had, in several instances before this, taken his tithes according to this mode of setting them out, he thought that this evidence would not make any difference in the case; and the plaintiff was thereupon nonsuited.

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Park and *Littledale* now ſhewed cauſe againſt a rule which had been obtained in the laſt term for ſetting aſide the nonſuit. They ſaid, that there was no ground for ſuppoſing that there exiſted any legal evidence of a cuſtom in this pariſh for tithing corn in the manner here attempted: though they admitted that this was the uſual manner of ſaving corn, according to good huſbandry, in the northern counties, eſpecially of late years, in order to preſerve it better from inclement weather till it was convenient to houſe it. Beſides, both parties agreed at the trial, that it was titheable by the tenth ſheaf, and not by the tenth rider. But the leſſee of the tithes inſiſted, that he ought to have an opportunity, when the tithe is ſet out, of comparing the tenth ſheaf with the other nine ſheaves, which he could not do by the mode of tithing adopted in this inſtance, that of taking the tenth ſheaf from out of the ſtanding rider, without firſt taking it to pieces. Neither can it be contended, that the parſon is bound to follow the reapers, and be prepared to take his tenth ſheaf immediately after the corn is made up into ſheaves, and before they are put into riders. The notice too of ſetting out the tithes was unreaſonably ſhort before the corn was carried off the ground; as to the wheat, not exceeding two hours; as to the oats, only half an hour; the defendant living a mile and a half off. In *Halliwell* v. *Trappes* (*a*), *Chambre* J. ſaid, that the parſon had a right to have the whole ten ſheaves pulled down out of the ſhock or rider, in order to examine whether his tenth ſheaf were fairly taken, by comparing it with the others. [*Le Blanc* J. obſerved upon a caſe which was there cited as decided by him, that if *ſhock* were not printed by miſtake for *ſheaf*,

(*a*) 2 *Taunt.* 55.

and

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and *sheaf* for *shock* in the report, which he believed was the case, the opinion there said to have been expressed by him was not defensible: for it was clear, that corn was titheable of common right in the sheaf and not in the shock.] They also referred to *Franlin* v. *Gooch* (*a*), and *Tennant* v. *Stubbing* (*b*).

Cockell Serjt., *Topping*, and *Richardson*, contrà, contended that this mode of tithing was for the benefit of the parson as well as of the farmer. Putting the sheaves immediately into riders is the best method of saving the corn, and is on that account very generally practised throughout the northern counties. The objection made was, that the parson or his lessee had no opportunity in this way of comparing the tenth with the other nine sheaves: but not only might he have done this when the corn was cut and sheaved, (of which he had notice,) and before the sheaves were put into riders, and also again when notice was given of tithing it, preparatory to the nine parts being housed; but the comparison might also have been made after the tenth sheaf was drawn from the rider, and while the other nine remained together in it: at least it was a question which ought to have been left to the jury, whether the comparison could properly have been made in that state. [*Le Blanc* J. If the farmer gave the parson reasonable notice of tithing the corn while in the sheaf in the first instance, there would be no objection to his afterwards shocking his own nine parts till it was convenient to house it.] There was nothing to prevent the lessee of the parson from attending upon the notice given on the 21st of

(*a*) 3 *Anstr.* 682. and 4 *Gwill.* 1441.
(*b*) 3 *Anstr.* 640. and 4 *Gwill.* 1438.

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August for the 24th. [*Bayley* J. That was not a notice to tithe, but only to begin to cut the corn on the 24th, if the weather suited. The farmer and not the parson is to set out the tithe. The notice to tithe was given while the sheaves were in riders; and the learned Judge gave his opinion against the mode of tithing adopted by taking the tenth sheaf out of the rider, without any opportunity given to the parson's lessee of comparing it with the other nine.] All the ten sheaves in the rider are visible on the outside, and the witnesses swore that one of them was taken fairly and indiscriminately from each heap. Tithing by the rider would certainly be bad, because the residue left untithed would be so much the larger: so that unless this mode of tithing may be adopted, the benefit of shocking the corn in the first instance to save it from the weather must be lost to the farmer, unless he incurs the additional labour and expence of taking the rider to pieces when it is tithed, and putting it together again afterwards. [Lord *Ellenborough* C. J. The ground of the nonsuit was, that in the mode of tithing actually adopted in this case, the parson had no opportunity of comparing his tenth sheaf with the other nine.] He had the same opportunity of making the comparison as the farmer's servant who tithed it, and who sometimes took one of the covering sheaves in turn. [*Le Blanc* J. The question is, whether the farmer had any right to make use of the parson's sheaf for any purpose of his own. It might as well be said of hay, that it is more convenient to put it into large shocks and tithe it from thence, because it is thereby better preserved; but has the farmer a right to do so, when by law it is titheable in grass cocks?] It is a question of general importance; for if this mode of tithing be illegal, it will

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affect the practice of good husbandry in the northern counties. 1811.

Lord ELLENBOROUGH C. J. I have no doubt that the mode of setting out the tithe adopted in this case was wrong. Corn must be tithed in the first convenient state in which the tithe can be collected after the corn is cut, which is in sheaves: and if the farmer adopt any mode of tithing which excludes or abridges the due means of the parson's comparing the tenth sheaf with the other nine, it is bad. Now when the sheaves are heaped together in the rider, only part of each sheaf can be seen, and the light is excluded in a certain degree from the greater part of the heap, so as to abridge the means of making the comparison properly. Then, however useful the two covering sheaves may be to protect the rest, and however more convenient that use of them may be to the farmer, what right has he to make such a convenience of the sheaves, one of which he may set out to the parson. There must at the time of tithing be a due separation of the tenth sheaf from the rest, with a due opportunity to the parson of comparing it with the other nine sheaves: but of this he was deprived by the mode of tithing adopted in this case; and therefore it is vicious in its principle.

GROSE J. In order to sustain the action, it was incumbent on the plaintiff to shew that the tithe was properly set out: but how does that appear? It is a settled principle, that the parson should have the opportunity of seeing that there has been a regular division of the corn to be tithed, that he may know whether the tithe has been properly set out: but no such opportunity was af-

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forded to him by the mode of tithing adopted by the plaintiff.

LE BLANC J. The common law mode of tithing corn muſt be the ſame in the north as in the ſouth of *England*, though probably the inconvenience of expoſing the corn in the ſheaf to the hazard of the weather may be felt more in the one part of the country than in the other. The only queſtion therefore could be, whether there were any cuſtom in this particular pariſh deviating from the common law mode of tithing: but no ſuch cuſtom was ſet up, nor was there any evidence offered to ſupport it. Then by the common law there can be no doubt that the corn, after it has been cut by the ſickle and put into ſheaves, muſt be tithed in the ſheaf: and this is according to the general principle of tithing, which takes place when the tenth part can be fairly ſeparated and diſtinguiſhed from the other nine. As in the inſtance of graſs cut for hay: it cannot be tithed in the ſwarth, but after it has been tedded and divided into graſs cocks, when the tenth part may be properly diſtinguiſhed from the reſt, it is then titheable; though it might be more convenient in many inſtances, to put it firſt into hay cocks: but that can only be done by conſent. So in reſpect of corn, after it has been tied together in ſheaves, then is the proper time for tithing it, becauſe that is the firſt ſtage in the proceſs of ſaving it, when the tenth part can be conveniently ſeparated and diſtinguiſhed from the other nine. Here then the parſon ought to have had his tithe ſet out while the corn was in the ſheaf: but after it had been ſo ſet out a convenient time, to enable the parſon upon notice to compare it with the reſt, the farmer, leaving the tenth ſheaf for the parſon

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to take, might, without objection, put his own nine sheaves into large shocks or riders, and the parson might put his own tenth sheaves into shocks to preserve them from the weather: but here the farmer put the parson's tenth sheaf into the same shock with his own nine, which he had no right to do, instead of leaving it on the ground and shocking only his own, after giving the parson reasonable time for making the comparison between them. If, after due notice, the tithe-owner does not come in convenient time, it would be his own fault, and he would lose the benefit of making the comparison.

BAYLEY J. I agree that the nonsuit was right. There being no particular custom of tithing in this parish, recourse must be had to the common law mode; and unless the tithe were set out as required by the common law, this action is not maintainable. The general rule is, that tithe shall be set out as early as it can conveniently be separated from the rest of the subject-matter, for the purpose of being set out; and it has been long settled, that corn must be tithed in the sheaf. It lies in the sheaf for some short time in order to give it light and air, and two hours might be a fair time, if the parson had due notice of the intention to tithe at the time, to give him an opportunity of making the comparison: and even if he do not chuse to come till after that time, and when the sheaves have been put into shocks or riders, if his tithe have been before set out, he may still compare it, though not so completely, with the other nine sheaves in the shock. But the farmer has no right to meddle with the parson's sheaves at all without his consent. But it is said, that the practice of shocking the whole is for the convenience and benefit of the tithe-owner, especially in the north, where the corn is more exposed to rain.

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tain. It cannot however be decided by any consideration of convenience. In countries where the inconvenience was very great, it would probably give rise to a custom to warrant the practice; but where there is no legal custom, the mode of tithing must be according to the common law. But the course which has been pursued in this case can in no respect be proper. For notice was in the first instance given to the tithe-owner by the farmer, that he would sometime or other, within (as it appears in the result) three weeks, reap his corn and set out the tithe. The whole of the sheaves when bound were immediately set up in riders, and in that state the tenth sheaf was drawn from each rider: and if the tithe-owner had happened to come in some instances within two hours, in others within half an hour, after the tithe was so set out, and when the riders were taken to pieces for the purpose of being carried, he would have had an opportunity of seeing whether his tithe had been set out fairly, by comparing his tenth sheaves with the rest: but this was not so fair a mode of tithing to him as the common law mode, which he had a right to insist upon.

Rule discharged.

Saturday, Jan 26th.

The KING *against* T. HARRIES, Esq. and C. PETERS, Clerk.

A criminal information may be moved for against magistrates for misconduct in the execution of their office, in the second term after the offence committed, there being no intervening assizes. But see another qualification of the practice in *Rex* v. *Marshall*, post.

CLIFFORD moved for leave to file an information against two justices of the peace for the county of *Salop*, upon a charge of having improperly refused an ale licence. But after stating that the refusal was in

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September last, *the Court* doubted whether this application were made in time; this being the *second* term after the fact complained of. Some gentlemen at the bar, however, as amici curiæ, suggested that the same point had been under the consideration of the Court a few years ago, when the objection had been also taken, that an application for a criminal information against magistrates, for an act done ex officio, ought to be made within the first term next after the supposed offence; and I recollected and mentioned to the Court, that this had occurred in the case of an application against Mr. *St. Aubyn* and other magistrates, for improperly refusing a licence to the keeper of the hotel at *Plymouth* dock, where the same objection was started; but the Court in that case finally permitted the motion to be made by the present Attorney-General, and granted a rule nisi (*a*). The precise time however of this precedent could not be then immediately recollected. The Court were also furnished with an instance of a criminal information moved for within the second term against Sir *William Yeo*, a

(*a*) My note of the case was as follows:—*Rex* v. *Morice*, *St. Aubyn*, *and Williams*, *Clerk*, *H.* 46 *Geo.* 3. *B. R.* *Gibbs*, *Solicitor-General*, and *East*, moved for a criminal information against the defendants, justices of the peace for the county of *Devon*, for improperly refusing to license a public house at *Dock*. But it appearing that the licence was refused as long ago as *September* last, and that though there were continual applications to and attendances on the magistrates in respect of it for some time afterwards, yet none were so late as last *Michaelmas* term; Lord *Ellenborough* C. J. at first thought that the application was too late, as not being made within the first term next after the imputed offence. But on reference to a case within the recollection of the Solicitor-General, and to the practice which had been generally understood to prevail, and was now recognized by the officers of the Crown-office in court, that applications of this kind had been received within two terms, the affidavits were suffered to be opened, and a rule nisi was granted; which came on to be heard in *Easter* term; when the Court had great doubts upon the merits: but the major part inclining against the rule, it was finally discharged, but without costs.

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magiſtrate of *Somerſetſhire*, in the 34th year of the king. But it was thought that the practice had been ſubſequently reviſed, and now required the motion to be made within the firſt term; and therefore *the Court* ſaid, that they would look at the precedents, and gave *Clifford* leave to move this matter again on *Monday*. On that day Maſter *Forſter* furniſhed the Court with a precedent in *H.* 41 *Geo.* 3. where a criminal information had been in fact refuſed againſt a Mr. *Thomas* (*a*), a magiſtrate, after one term had intervened: and therefore when this motion was renewed, the Court, governed by this laſt precedent, which was then ſuppoſed to be in point, refuſed to enter into the inquiry. But a doubt afterwards ariſing, whether the refuſal of the information in that inſtance proceeded entirely upon the point of time as to the term; and the Court having in the mean time their recollection of the firſt-mentioned proceeding more perfectly recalled, Lord *Ellenborough* C. J. on *Thurſday*, the 31ſt inſtant, informed *Clifford*, that upon an accurate review and conſideration of the precedents and practice, he was now in time to move for the information within the ſecond term, no aſſizes having intervened. *Clifford* ſaid that he would ſend again for the papers, which had been returned into the country: but the motion was not in fact renewed.

(*a*) Vide S. C. in *Rex* v. *Marſhall and Another*, poſt.

CLARK *against* BAKER.

Thursday, Jan. 31st.

The defendant having been sued and held to bail by a wrong christian name, but the plaintiff having declared against him, and bail having been put in and perfected for him by his right name, the bail cannot afterwards object to the irregularity, upon a motion to enter an exoneretur upon the bail-piece.

THE writ was sued out against the defendant, and an affidavit to hold him to bail made, by the name of *Thomas Baker*; but the declaration was afterwards filed against him by the name of *Charles Baker*, and by the same name bail was put in for him and perfected. And now the bail themselves applied by *Reader* for a rule upon the plaintiff to shew cause why an exoneretur should not be entered on the bail-piece: which *Taddy* opposed. And the cases of *Delanoy* v. *Cannon* (a), and *Dring* v. *Dickenson* (b), were referred to; which shew that when the writ has been sued out against the defendant by a wrong name, and he has not appeared, but the plaintiff has filed common bail for him, the plaintiff cannot declare against him in his true name, as the party sued by such other name. But in *Hole* v. *Finch* (c), which was also referred to, where a defendant, sued by a wrong name, *appeared* by his right name to the writ, and then the plaintiff declared against him by his right name, the Court refused to set aside the proceedings for irregularity.

Lord ELLENBOROUGH C. J. We do not pronounce what effect the putting in bail for the defendant in his right name might have between other parties and upon other occasions: it is sufficient to say, that the persons now applying to discharge the bail-piece, having put in bail for the defendant by the name of *Charles*, have con-

(a) 10 *East*, 328. (b) 11 *East*, 225. (c) 2 *Wils.* 393.

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eluded themselves from objecting that that was not his true name.

The other Judges agreed: and *Bayley* J. observed, that the objection ought to have been made sooner, that is, to the affidavit to hold to bail; and that the case of *Hole* v. *Finch* was nearly in point.

Rule discharged.

Friday, Feb. 1st.

ROUTH *against* THOMPSON.

After an order made by the king in council on the 2d, and gazetted on the 5th of *September* 1807, to detain and bring into port all *Danish* vessels, a *hired armed ship of his majesty* took, off *Lisbon*, on the 10th, and carried in thither a *Danish* vessel; and without instituting any proceeding in the admiralty-court there, though *Portugal* was an ally with *England* in the war, sold her cargo to defray the expence of repairs, and took in a loading on freight for *London*, with which she sailed on the 3d of *November*, on which day hostilities were declared against *Denmark* by another order of council: and on the 12th of *November* an insurance was made by order of the prize agent appointed by the captors, in consequence of a letter written by him in *October*, before the declaration of hostilities; directing the plaintiff to insure "*for my account* the *Danish* vessel *Knud Terkelson*, *which has been detained by his Majesty's armed ship* Duchess of Bedford, *and for which I am authorised to act as agent*;" and concluding with expressing the agent's confidence that the plaintiff would do the best *for the interest of the concerned*: and after such insurance was effected, the king, by another order of council, reciting the circumstances, adopted the insurance. Held that his majesty, having a lawful possession of the captured vessel through the act of his officers and servants, whose possession was legalized by the previous order to detain *Danish* vessels, whether known to them or not at the time of the capture, had an insurable interest therein; and that it was competent for him to adopt the insurance made by order of the agent appointed by the captors, whose letter of instructions to insure *for his account* was sent in his general character of *agent for the capturing ship*, and permitted by the terms of it an insurance to be effected for the benefit of any who might ultimately appear to be interested; and none other but his majesty having an interest in the vessel seized before the declaration of hostilities and order for reprisals.

THIS was an action of assumpsit, commenced by the plaintiff on the 21st of *June* 1810, upon a policy of insurance effected by him in his firm of *P.* and *H. Le Mesurier* and Co., and subscribed by the defendant for 300*l.* upon the 12th of *November* 1807, upon the ship *Knud Terkelson*, valued at 3500*l.*, and on freight not valued, at and from *Lisbon* to *London*. The interest was averred to be in his majesty, and the loss stated to be by perils

perils of the sea. The defendant pleaded the general issue, and at the trial before Lord *Ellenborough* C. J., at the sittings after last *Trinity* term at *Guildhall*, a verdict was found for the plaintiff, for 238*l.* 11*s.* 0*d.*, subject to the opinion of the Court on the following case:

On the 2d of *September* 1807 an order was made by his majesty in council for the detention of *Danish* vessels; by which it was, amongst other things, ordered, that a general embargo be made of all *Danish* vessels, with the persons and effects on board, then within or which should thereafter come into any of the ports, &c. of his majesty's dominions; and that the commanders of his majesty's ships of war and privateers should detain and bring into port all *Danish* vessels; taking care to preserve their cargoes, so that no damage or embezzlement should be sustained. And instructions were issued accordingly to the commanders of his majesty's ships of war and privateers. This order of council was inserted in the Gazette of the 1st to the 5th of *September* 1807. On the 10th of the same *September* the commander and crew of his majesty's hired armed ship the *Duchess of Bedford* took and detained, off the coast of *Lisbon*, the *Knud Terkelson*, a *Danish* vessel, laden with salt, the property of *Danish* subjects, and sent her into *Lisbon*, where the vessel being found so leaky that she could not proceed to *England* without repair, was repaired accordingly, and the salt was sold for the purpose of defraying the expence of such repairs: but no proceedings were instituted in any court of admiralty; there being at that time a *Portuguese* court of admiralty exercising the ordinary jurisdiction of a court of admiralty, and *England* and *Portugal* being allies in the war. The vessel being repaired, and there being at that time a considerable

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ſiderable demand at *Liſbon* for tonnage to convey *Britiſh* property to *England*, the captors took on board of her a cargo of wines and other merchandize to be carried to *London* on freight; which would have amounted, in the event of her arrival at *London*, to 1263*l.* 1*s.* 3*d.* On the 3d of *November* 1807 a general order by his majeſty in council *for repriſals* againſt *Denmark* was publiſhed; ordering general repriſals to be granted againſt the ſhips, goods, and ſubjects of the king of *Denmark*; except any veſſels to which his majeſty's licence had been granted, or which had been directed to be releaſed from the embargo, and had not ſince arrived at any foreign ports: ſo that as well his majeſty's fleets and ſhips, as alſo other veſſels commiſſioned by letters of marque or general repriſals or otherwiſe by the lords commiſſioners of the admiralty, ſhould and might lawfully ſeize all ſhips, veſſels, and goods belonging to the king of *Denmark* and his ſubjects, &c. and bring the ſame to judgment in any of the courts of admiralty within his majeſty's dominions. On the 3d of *November* 1807 the *Knud Terkelſon*, with her cargo of wines, &c. ſailed with convoy from *Liſbon* on the voyage inſured, and in *December* following arrived at *Portſmouth*; but in going from thence to the *Downs* was driven by ſtreſs of weather to the coaſt of *France*, where ſhe was loſt by the perils of the ſea. On the 28th of *October* 1807 Mr. *Sampſon*, being appointed agent by the ſaid captors, ſent to the plaintiff the following order for inſurance:—"*London*, 28th *October* 1807. Gentlemen, Mr. *John Leigh* of this city having recommended me in caſe of being willing to make any inſurance on ſhipping to your houſe, I have to requeſt the favour of your inſuring *for my account* the *Daniſh* veſſel named the *Knud Terkelſon*, *which has*

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been detained by his majesty's armed ship Duchess of Bedford; and for which *I am authorized to act as agent.* The *Knud Terkelson* is 350 tons burthen, &c. and valued in 3500*l.*, which sum I beg you will insure, as also the freight she may make as interest may appear by her bills of lading hereafter. The ship is not armed, and will go from hence to *London* with or without convoy: you will therefore govern yourselves accordingly. She is to sail in the course of a few days hence, and I wish her to be insured against all risks. I have no doubt, from the recommendation of Mr. *Leigh*, that you will do the best *for the interest of the concerned.* (Signed) *J. J. Sampson.*

The plaintiff, on the receipt of this letter on the 12th of *November* 1807, procured the policy in question to be underwritten by the defendant, at and from *Lisbon* to *London*, at a premium of 12 guineas per cent., to return 5*l.* per cent. for convoy. The insurance was declared to be 3500*l.* on the ship *Knud Terkelson* valued at 3500*l.*, and on freight; but the freight was not valued in the policy. None of the officers or crew of the *Duchess of Bedford* are owners of that vessel: neither is his majesty the owner thereof, otherwise than as having hired the same as an armed ship, to be employed as such for a limited period in his majesty's service. On the 20th of *June* 1810 the following order was made by his majesty in council. Whereas by his majesty's order in council of the 2d of *September* 1807 it was ordered, that the commanders of his majesty's ships of war and privateers should detain and bring into court all ships and vessels belonging to the subjects of the king of *Denmark*, or bearing the flag of the king of *Denmark*, but that the utmost care should be taken for the preservation of the cargoes on board, &c. And whereas it has been repre-

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sented unto his majesty, that on the 10th of *September* 1807, his majesty's armed brig *Duchess of Bedford*, under the command of Capt. *R. Milford*, took and detained off the coast of *Lisbon* a *Danish* ship called the *Knud Terkelson*, laden with a cargo of salt, the property of the king of *Denmark*; and that the ship being so leaky that she could not proceed to *England* without repair, she was sent into *Lisbon*, where she received considerable repairs, and her cargo of salt was sold to defray the expences of such repairs: and upon the completion thereof the said ship *Knud Terkelson*, having on board a cargo of wines, &c. to be brought to *London* on freight, sailed upon the voyage to *London*, but was driven by stress of weather upon the coast of *France* in *December* 1807 and totally lost: and it hath been further represented to his majesty that the said Capt. *Mitford* did on the 12th day of *November* 1807 cause an insurance to be effected by Messrs. *P.* and *H. Le Mesurier* of *London*, Merchants, (i. e. the plaintiff,) for 5500*l.* on the said ship and her freight: and whereas it is judged expedient *that his majesty should adopt and approve of the said insurance and authorise, as far as in law he may, the recovery thereof*; his majesty doth therefore, by and with the advice of his privy council, *hereby adopt and doth approve of the said insurance*; and doth hereby permit and authorize the said Messrs. *P.* and *H. Le Mesurier* and Co. to sue for and recover payment of the sums thereby insured *for his majesty's benefit*, and to make the necessary averments in any proceedings at law for obtaining a legal determination upon the rights of the agents effecting the said insurance to recover and enforce payment thereof *for the benefit and on behalf of his majesty*, but subject to the condition that Messrs. *P.* and *H. Le Mesurier* shall hold whatever sum of money they may

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recover, after payment of all expences incurred in the recovery thereof, at the difpofal of his majefty: whereof all perfons concerned are to take notice and govern themfelves accordingly. (Signed) *W. Faukener.*"

The defendant has paid the premium into court; and no proceedings were ever had in the admiralty court or elfewhere againft the faid fhip *Knud Terkelfon*, for the purpofe of condemning her as a droit of admiralty to his majefty. The queftion was, whether the plaintiff were entitled to recover? If he were, the verdict was to ftand: if not, then a nonfuit was to be entered. But the fpecial cafe might be turned into a fpecial verdict, if the Court thought fit.

Richardfon, for the plaintiff, made two queftions: 1ft. Whether the king had an infurable intereft? 2dly, Whether this infurance can enure to his majefty's benefit? In affirmance of the former, he relied on *Lucena* v. *Craufurd* (*a*), *Routh* v. *Thompfon* (*b*), and *Stirling* v. *Vaughan* (*c*). In the firft of thefe cafes, the plaintiff finally recovered on the king's intereft, though the veffels were not only detained and infured, but moft of them were alfo loft before the order for reprifals iffued; whereas here the infurance was not effected till after the order of reprifals againft *Denmark*. This cafe therefore is fo much the ftronger in fupport of the king's intereft in the captured veffel. The capture and detention gave the king a legal poffeffion, which it was competent to him to infure: and if he were legally poffeffed, he had a right to employ the fhip for freight, and the freight

(*a*) 2 *New Rep.* 269—329. and *Park*, 360—2.
(*b*) 11 *Eaft*, 428. (*c*) *Ib.* 619.

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would be due to him. [Ld. *Ellenborough* C. J. said that there was no doubt either here or elsewhere but that the king could insure on the ground of his having a legal possession of a vessel taken from an enemy.] Then, 2dly, this insurance may enure for the benefit of the crown. The rule, quod omnis ratihabitio retro trahitur, et mandato priori æquiparatur, laid down by Lord *Coke*, and applied to the subject of insurance by *Buller* J. in *Wolff* v. *Horncastle* (*a*), and by Lord *Ellenborough* C. J. in *Stirling* v. *Vaughan* (*b*), goes the whole length of this case. The captures were made under the authority of the crown, and the crown had an interest either general or particular in the preservation of the captured property. Then the persons employed to make the capture had an incidental power to do such acts as were lawful and proper to be done for the preservation of the property, and which tended to the king's benefit, such as to insure it; and though the king might afterwards renounce the act; yet if he did not, it enures for his benefit. In *Lucena* v. *Craufurd* (*c*), the letter of Mr. *Rose* of the treasury, signifying the king's assent to the insurances, was written after most of them had been effected; and yet no distinction was taken between the cases in that respect. It may be said here that the order for insurance sent by *Sampson*, being stated to be "*for my account*," excludes any contemplation of the king's interest: but he could not mean by that expression *his own* benefit, individually; because he afterwards adds, that he was authorized to act "as agent for the *Danish* ships detained by his majesty's armed ship the *Duchess of Bedford*." "*On my account*" therefore meant no more than

(*a*) 1 *Bos. & Pull.* 323. (*b*) Vide 11 *East*, 620, 3.
(*c*) Vide *ib.* 625.

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that he was to be anſwerable for the premiums. Then if any adoption of the inſurance were capable of being made in this caſe by the crown, it cannot be denied that it has been done.

Carr, contrà, contended, firſt, that the inſurance was not effected in the firſt inſtance on account of the king, but of the captors; and that the king could not, by any ſubſequent adoption, make an inſurance enure to the benefit of the crown which was really made for the benefit of others: though he admitted that if it had been eſſentially made on account of the crown, but without any previous authority, the king might afterwards adopt it. He relied on *Routh* v. *Thompſon* (a). [But Lord *Ellenborough* C. J. obſerved that it was expreſsly ſtated as a fact in that caſe, that the inſurance was made *on account of the captors*.] To which he anſwered that the circumſtances of the two caſes were eſſentially the ſame, with the addition of the ſubſequent adoption of the inſurance by the crown in the order of council proved in this caſe. [And in anſwer to another obſervation of his Lordſhip, that ſome of the policies in *Lucena* v. *Craufurd* were effected before Mr. *Roſe's* letter from the treaſury, adopting the inſurance;] he endeavoured to diſtinguiſh the caſes, by ſaying that the *Dutch* commiſſioners there were the appointed agents of the crown. [But it was again obſerved that the commiſſioners had no expreſs authority to inſure; and in fact their firſt application to the treaſury to authorize the inſurance had been rejected: and in *Stirling* v. *Vaughan* there was no ſubſequent adoption by the crown to do away the effect of the fact found in the caſe.] Still, he argued, that it was a queſtion for

(a) 11 *Eaſt*, 428.

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the jury on whose account the insurance was made. That in the last trial of *Craufurd* v. *Lucena*, Lord *Ellenborough* had directed the jury, that if any of the king's subjects effect an insurance on account of and for the benefit of the king, his majesty may adopt it; the propriety of which direction was recognized by the House of Lords: and he insisted that in this case the same question should have been submitted to the jury, and that the evidence stated shewed that it was not effected for the crown, but for the separate interest of the captors; and therefore could not be adopted by the crown. [Lord *Ellenborough* C. J. For what reason then was a special case reserved, in which it is referred to us to draw the conclusion, whether upon the evidence this insurance could enure to the benefit of the crown. The general facts were agreed to be stated here, leaving it to the Court to draw that conclusion, if it might be drawn. In the former case, the conclusion of fact was drawn, that the insurance was made on account of the captors. But where it is a mixed matter of construction, it is more proper for the direction of the Court to the jury. The party directing the insurance was appointed agent for the captors, which captors were themselves in one sense the agents of the crown, and therefore it brings it to the same question. Then, by the terms of the letter of instruction for making insurance, the agent's correspondents were to "do the best *for the interest of the concerned.*" The agent at the time did not know to whose benefit the prize would accrue, nor was it necessary that he should know the very persons interested; therefore he wrote for the insurance to be made for the benefit of those concerned: then, if it turn out that the interest to be insured was the interest of the

crown,

crown, why may not the crown adopt it? And admitting that a prize-agent has no authority without ſuch adoption to bind the crown by making inſurance; yet if he do an act for the benefit of the crown, the crown may adopt it. *Bayley* J. In *Stirling* v. *Vaughan* the captors had an inſurable intereſt; whereas here nobody but the king had an inſurable intereſt.] He then admitted that if he could not diſtinguiſh this caſe from *Craufurd* v. *Lucena*, and *Stirling* v. *Vaughan*, the defendant could not ſucceed. But he obſerved further, as to *Craufurd* v. *Lucena*, that the *Dutch* ſhips were ſeized and detained under a previous order from the crown to bring them in; whereas here the *Daniſh* ſhip was captured de bene eſſe, as it may be ſaid, upon ſpeculation; and not in conſequence of any order from the crown known at the time. In that caſe too all that were brought in were condemned, though ſome were loſt before, and the condemnation would refer back to the capture: but here there was no condemnation; which there might have been though the ſhip were loſt: it might have turned out that the ſuppoſed prize was a *Daniſh* ſhip under the protection of a *Britiſh* licence; or there might have been meritorious circumſtances attending her to induce a reſtoration by the crown. [Lord *Ellenborough* C. J. We can preſume nothing upon the ſubject: we only look to ſee whether the ſhip were lawfully poſſeſſed by the captors. *Bayley* J. The more improperly the capture was made by thoſe in command of the king's ſhip, the more neceſſary it was that the intereſt being in the king, the inſurance ſhould be adopted by his majeſty, to enable him the better, in caſe of a loſs, to indemnify the captured.] He then referred to the caſe of the *Flad Oyen* (*a*), to ſhew that condemnation is

(*a*) 1 *Rob. Adm. Rep.* 139.

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necessary to transfer the property in a prize: but the Court thought that immaterial, upon a question whether the crown, having through its agents, the captors, a lawful possession, might not insure; though he argued that the ship was not in possession of the crown, but of those who had taken her upon speculation, without the authority of the crown.

Lord ELLENBOROUGH C. J. The points made for our consideration are, first, whether the king had an insurable interest, supposing he had been apprized of his right at the time when this insurance was made, and had determined to insure it; and next, whether he could adopt it after it was made. The facts are, that after a proclamation by the king in council for the detention of *Danish* vessels, an armed ship in his majesty's service took possession of the *Danish* ship in question. Was it taken on behalf of the king? It was taken by his servants in an armed brig engaged in his service; and if not taken piratically must have been taken for him. The king therefore had possession of the *Danish* vessel: for as between his majesty and those who were acting on his behalf and under his authority, and who were accountable to him if they damaged or embezzled the property, their possession was for this purpose his possession. Then had the king a lawful possession? Was it ever made a question in a court of law, whether the king were a wrong-doer in seizing the vessels of a foreign nation? If then his majesty had a lawful possession, may he not insure the property against loss? He was legally competent to do so, though not in the practice of insuring his own ships of war. But it may be said that he knew nothing at the time of the insurance. It was effected however by the order of

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his officers, whose duty it was to take care of the property, and who were responsible to him for it. Then may he not adopt the act? The insurance is not indeed made in terms in his majesty's name; but it was made by the direction of *Sampson*, who had been appointed agent by the captors for the prize: but the captors had no interest of their own in it, and therefore for their own benefit they were not competent to appoint an agent: they must therefore be taken to have appointed him as agent on the part of the crown, whose servants and agents they were. Then *Sampson* writes the letter authorizing the insurance to be made, and therein he desires insurance to be made "for *my* account." That certainly was not intended as a direction to insure his own individual interest, but merely that credit was to be given to him for the premiums: and he proceeds to state that the insurance is to be made of the *Danish* vessel *Knud Terkelson*, "which had been detained by his majesty's armed ship *Duchess of Bedford*, and for which he was authorized to act as agent." There was no communication of the names of the particular persons for whose benefit the insurance was to be made; nor was it necessary that the agent should then know who they were: but it was to be effected in the name of the agent for the benefit of those who should be concerned in interest: and the underwriters bound themselves to indemnify those who should appear to be interested in the prize, in case of loss: it must therefore enure for the benefit of the crown, which alone had any interest in the captured vessel. The crown then having an insurable right afterwards adopted this act of its servants and agents. And if the policy were made for the benefit of those concerned, and the crown were concerned in interest, there can be no doubt that it may adopt the act,

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and it has adopted it. The case of *Craufurd* v. *Lucena* is full in point to this: the *Dutch* commissioners were strangers to the property before it came within the ports of this kingdom, though connected with it in trust when it was brought there: but the crown afterwards adopted the insurances effected by their directions; and the House of Lords held that to be a valid adoption, as well in respect of the ships taken before as afterwards. Here then there was an adoption by the crown of the act by which the property was acquired; and there was also an adoption of the insurance made afterwards to protect it. By the adoption of the act of taking possession, there was an insurable interest in the king; and the adoption of the insurance gave him also an interest in the policy. The facts therefore being expressly stated from whence this conclusion may be drawn, and which it was left to us, by the statement of the case, to draw, there is no occasion to send the question again to a jury.

Grose J. Considering the principles upon which the case has been argued, and the cases which have been before decided upon those principles, I am clearly of opinion, without going over the same grounds again, that the plaintiff is entitled to recover on the averment of interest in his majesty.

Le Blanc J. The *Danish* vessel, which is the subject of this insurance, was taken possession of by the officers and crew of an armed ship in the service of government, under an order of council, shortly after the order issued; and while the vessel continued in their possession an order was sent by them to the plaintiff to make insurance on her; and the argument has turned chiefly upon the terms

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of the letter directing that insurance to be made. It has been contended that it was an order to insure on behalf of the officers and crew of the armed ship: but upon attending to the terms of the letter, it is not so confined. The direction in the first place to insure "on *my* account" was neither meant by the writer, nor understood by his correspondents, as an order to insure his individual interest as agent; nor does he order the insurance to be made on behalf of the captors; but it is to be made on his account, in the character, as he afterwards describes himself, of agent for the *Danish* vessel *Knud Terkelson*, detained by his majesty's armed ship *Duchess of Bedford*: and he concludes by saying that he has no doubt that the best will be done for the interest of the concerned. It is argued however that this is not distinguished from the former case of *Routh* v. *Thompson*, where the insurance was expressly stated to be made *on account of the captors*: but here the order is in more general terms; for it is to insure on account of the agent. *Sampson* contracts as agent, and the insurance is ordered to be made for him in that character: it would therefore enure for the benefit of the party or parties for whom it should turn out that he was agent. Then the question will be whether the party in whom the interest appears to have been may not adopt the act of the agent, and whether the subsequent ratification shall not be referred to the prior order? That is decided by the authorities. Here then the crown has adopted the insurance. And that brings it to the second question, whether the crown had an insurable interest? The *Danish* ship, it is said, was stopped, not under the authority of the crown, but upon speculation, that such an order might be issued; and that it was not probably known to the captors at the time that such an

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order had iſſued. So it may be ſaid that the inſurance was upon ſpeculation that the captors might ultimately receive a benefit from it by the favor of the crown: but if there exiſted, at the time, an authority to detain or capture the veſſel, whether the captors did or did not know it at that time is not material: the crown in whoſe ſervice they were may, if it pleaſe, adopt their act. Then if there were a lawful poſſeſſion in the crown through its officers and ſervants, the agents appointed by the perſons in the actual poſſeſſion of the captured veſſel might inſure it; and that would bring the caſe within the authority of *Craufurd* v. *Lucena*. Condemnation was not neceſſary to give the crown a lawful poſſeſſion at the time. I do not conſider *Stirling* v. *Vaughan* (*a*) as a caſe deciding that the verdict could not have been ſupported on the count averring the intereſt to be in the crown: it was ſufficient to decide that caſe that the captors had an inſurable intereſt under the act of parliament; for if the verdict for the plaintiffs were ſuſtainable on either of the counts, there was no ground for a new trial. It was therefore unneceſſary to come to a final determination on the other point. None of the former caſes therefore have decided againſt an inſurable intereſt in the crown in this caſe.

Bayley J. No fair doubt has been raiſed in this caſe. It is clear I think that the king had an inſurable intereſt: and I ſee nothing in the caſe which ſhews that the poſſeſſion of the captors was not a lawful poſſeſſion. It is ſaid that the *Daniſh* veſſel was taken upon ſpeculation before the captors could have known of the order of council

(*a*) 11 *Eaſt*, 619.

authorizing

authorizing the detention: but that is begging the question. It is possible that the captors might have known it at the time: but if they did not, and did make the capture upon speculation; yet if there were an authority existing at the time, that is enough. Supposing however that the capture was wrongful, on the part of the captors; still I am by no means clear that the crown might not insure the captured vessel. How would the case stand? There would be a capture of a vessel by the king's officers; and if that were wrongful, the king would be bound in honor to make restitution or compensation to the injured party. Then an insurance made on that possession would provide a fund out of which compensation might be made in case of a loss. But here the king had a lawful possession, and there was no interest in any other than the king, for which an agent could be appointed. Then why might not the king adopt the act? In the former case of *Routh* v. *Thompson* the Court considered themselves to be tied down by the precise fact stated, that the policy was made *on account of the captors*, which precluded them from looking at any other interest. In *Stirling* v. *Vaughan* there was another description of persons, the captors, in whom the interest was averred in one of the counts, who clearly had an insurable interest under the prize acts, and therefore the Court applied the insurance to their interest, as being that which was the more likely to have been in the contemplation of the party making the insurance, but without excluding that of the crown: and whoever reads through the case must see that the Court considered that if there had been no interest in the captors, they would have supported the policy upon the interest of the king. But there is another consideration which bears upon the question:

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question: could the agent who procured the insurance have recovered back the premiums paid by him if the crown had not adopted the insurance? I should think not; because of the choice which the crown had to adopt it; in respect of which the assurer would have incurred the risk. If a prize-agent will advance his money for the premiums, upon the hope that the crown will adopt his act, the circumstance of his not having a valid claim of interest in the prize without such adoption will not preclude the right of the crown to adopt it.

Postea to the Plaintiff.

Tuesday, Feb. 5th.

DOBREE and Others *against* The EAST INDIA Company.

Under the common printed form of the *East India* Company's charter-parties, the company are warranted in assisting and acting conjointly with his majesty's government, at their requisition, in sending their chartered ships upon a warlike expedition against the king's enemies, under the command of the king's officers placed on board the same. And a ship of that description is still under the charter-party, though alterations were ordered to be made in her upper works by the company, to enable her to carry a larger number of guns, &c. than her stipulated force; and though a king's officer assumed the command of her, and hoisted the king's broad pendant on board.

THIS was an action brought by the plaintiffs, as owners of the ship *Busbridge*, against the *East India* Company: the declaration contained counts for the use and hire of the ship for a certain sum; for the use and hire of her upon a quantum meruerent; for work and labour; for money paid, laid out and expended, and the other common counts; and on non-assumpsit pleaded, a verdict was found for the plaintiffs at the trial before Ld. *Ellenborough* C. J. at *Guildhall*, for 30,000*l.* damages, subject to the arbitration of merchants as to the quantum, and to the opinion of the Court upon the following case.

The ship *Busbridge* of 771 tons burthen, having been originally built for the service of the *East India* Company,

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and having completed her six regular voyages under other owners, was on the 29th of *Nov.* 1795, in consequence of the company's proposals to take up certain extra ships for bringing home merchandize from *Bengal* for one, two, three, or four voyages, tendered by the plaintiffs, her then owners, to the company "for one voyage to *India* or *China*;" which tender was on the 9th of *December* following accepted by the company at the freight of 34*l.* per ton on the ship's registered admeasurement; and 13*l.* 10*s.* per ton for surplus tonnage. Previous to the ship's sailing on the voyage, a charter-party in the common printed form (*a*) was entered into and executed by the plaintiff

(*a*) The charter-party, which made part of the case, was the common printed charter-party of the *East India* Company, with the blanks filled up: and the words particularly referred to were those in the first page, whereby it was witnessed that the owners "let to freight all the said "ship (*Busbridge*, of 771 tons,) unto the said United Company, and "that the said United Company have hired and taken to freight all "the said ship, for a voyage with her to be made as hereafter men-"tioned, *in trade, and also in warfare, and on any other service whatsoever,* "as the said Company, or any of their governors, presidents, &c. au-"thorized, &c. *shall require or direct.*" And these further words in p. 19.: "Provided always, and it is hereby covenanted and agreed, that during "the said ship's stay in *India* or *China*, the said Company's presidents, "factors, and agents shall have liberty to employ her *in trade, and also in* "*warfare, or otherwise howsoever*; and shall have liberty *to let out the said* "*ship to freight* for the said Company's sole benefit, for so long time as "they please, not exceeding the said 11th of *February* 1798; but after "the said 11th of *February* 1798, the said ship may return for *England*, "and the said Company shall not be liable for any further demorage, or "any damage that may accrue by her detention after that time." It was also therein covenanted and agreed, (p. 3.) that the ship should be "well and sufficiently victualled, tackled, and apparelled, and also "well and sufficiently furnished with all necessary stores, 26 *pieces of* "*ordnance mounted*, 20 *whereof shall be* 9 *pounders on the main deck, and* 6 "*shall be* 4 *pounders on the quarter deck*, 45 *barrels of gunpowder, shot* 30 "*rounds, ammunition and furniture equal to and sufficient for such a ship and* "*voyage*." It was further covenanted that the "master, together with "the ship, officers, and ship's company shall, in and during the said in-"tended voyage, with the said ship and boats, at sea and in port, toge-"ther with such part of the ship's company as shall be necessary, not "exceeding

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plaintiff and the company on the 1st of *May* 1796; and on the 29th of *July* 1796 the *Busbridge*, being in all respects equipped and manned in the manner prescribed by the charter-party, was despatched by the company on her destined voyage for *Madras* and *Bengal*. In *March* 1797 she arrived in *Bengal* river; and her arrival was immediately notified by Captain *John Dobree*, her commander, to the governor-general in council. On the 14th of the same *March* the captain received official notice from the company's board of trade at *Calcutta*, that the *Busbridge*

" exceeding at any one time 30 men, unto, from, and upon the land, " in a defensive and offensive manner, in trade and also in warfare, if " so required as aforesaid, be ready to serve, and shall accordingly ho- " nestly, faithfully, and manfully serve the said company, their factors " and assigns." And the owners and master covenanted, that the master for the time being should obey the company's orders, and those of their governors, &c. abroad: and that it should be lawful for the company, their presidents, &c. if they saw cause, *to remove, restore, and continue the master and officers of the ship*; and that no officer should be employed on board who should be disapproved by the company, their governors, &c. But " if the company's presidents, agents, or chief " factors abroad shall displace or remove the master or any officer or " officers of the ship for the time being, that then and thereupon the " next in degree to such master or other officer or officers so removed or " displaced, who shall be approved by the president, &c. shall succeed " to his or their employments, &c. And if such new master or other " officer or officers shall not be received into, or shall be kept out of " such their employments," &c. the company shall be discharged from all their covenants in the charter-party. By another part, (p. 17.) In default of loading the ship within four months after her arrival in *India*, she was " to enter into demurrage of 20*l.* 16*s.* 8*d.* a day, for so long " time as she shall be detained in *India*, &c. within the said limits, " in the service and employment of the said company; which deten- " tion *shall* not exceed the 11th of *February* 1798." But by another clause, (p. 18.) " The company shall not allow or pay any demurrage " for the time the said ship shall take up in amending any defects, ex- " cept as after-mentioned; *i. e.* If the said ship shall be employed by " the Company in warfare, and shall receive any damage in offensive " service against an enemy; then and in such case no deduction from " the said demurrage shall be made for any time absolutely and neces- " sarily lost by repairing the said damage arising in such offensive ser- " vice.".

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would be loaded and dispatched for *Europe* with all possible expedition; for which some preparation was accordingly made at a certain expence to the owners. On the 29th of the same month Captain *Dobree* received official notice from the said board, that the ship would be detained till *June*, and would be kept in *Diamond Harbour*. On the 8th of *April* 1797 Captain *Dobree* received another official notice, *that* "*his ship was required* "*for a service of emergency*, and that she should be got "ready for sea with all practicable expedition. *That her* "*present force was to be increased as much as her construc-*"*tion, the size of her ports, &c. would admit of.*" And he was further directed to inform the board "*of the number* "*of guns, and the weight of metal she was capable of* "*carrying, and the number of seamen she would require* "*upon such increased equipment, and the number of soldiers* "*proper to serve as marines.*" In answer to this, Captain *Dobree* in his report to the board, after requesting the board "to recollect that the ship was on her last voyage, "stated his opinion that 26 guns of 9 and 12 pounders "on the gun-deck, and 10 guns of 6 and 4 pounders "on the upper-deck, *making in all* 36 *guns*, would be as "much as the ship would be fit to bear. That *her pre-*"*sent compliment of seamen should be increased to* 200 Euro-"peans, or two natives for one *European*; and the num-"ber of soldiers to act as marines, fifty." The service of emergency alluded to in the order of the 8th of *April* 1797 was a hostile expedition *projected by his majesty's government at home* against the *Spanish* settlement of *Manilla*, within the limits of the company's exclusive trade; *his majesty being then at war with the king of* Spain: in aid of which expedition, and of his majesty's troops and ships employed therein, the assistance of the *East*

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India Company's ſhips and forces was applied for and obtained from the company, and the ſhips and forces of his majeſty and thoſe of the company were *conjointly employed* on the ſaid expedition *under his majeſty's officers*. In conſequence of which the company, after the determination of the *Manilla* expedition in 1803, preferred a claim to his majeſty's government at home for reimburſement of the expences the company had incurred therein; and in ſuch claim, amongſt charges for ſums paid to the owners of other ſhips, *a charge for the ſum of 6083l. 6s. 8d. paid by the company to the plaintiffs for* 292 *days demurrage of the ſhip* Buſbridge *in* India, after the rate provided by the charter-party, was included. And at the foot of ſuch claim there was a note, ſtating, that the owners of ſeveral of the ſhips had made very large demands on the company, in addition to the ſums therein mentioned, and which demands were then waiting the deciſion of this Court. The claim for the ſaid ſum of 6083*l*. 6*s*. 8*d*. was allowed in account by government: but the lords of his majeſty's treaſury refuſed to pay any further ſums for the uſe of the owners of the ſaid ſhip. The company's government in *India* having determined to convert the *Buſbridge* into a fighting ſhip for the ſaid expedition, by an official order of the 18th of *April* 1797 directed Captain *Dobree* to increaſe his ſhips's force to 26 twelve pounders, and 10 ſix pounders, with a proper compliment of men and ſtores; in which order it was ſtated, that the charge for the men exceeding the charter-party number, as well as all other expences conſequent upon the increaſed equipment, would be defrayed by the company. The ſhip was alſo directed to be victualled for ſix months; "and Captain *Dobree* was deſired" to report the additional ſtock he would require, if

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he would engage to provide it. Captain *Dobree* having in his answer engaged to provide the additional ſtock required, and having ſuggeſted *certain neceſſary alterations in the upper works of the ſhip, to accommodate her to her new character of a ſhip of war;* by an order of the 24th of *April* 1797 it was officially notified to him *that theſe alterations ſhould be made*, and that the expence for extra-carpenters would be made good by government. While theſe alterations were in progreſs, Captain *Dobree* on the 9th of *May* 1797 received an official notification, "that "the governor-general in council had countermanded "the order for arming his ſhip, and had reſolved that "ſhe ſhould proceed to *Madras*, where he would receive the inſtructions of that government reſpecting "her ſubſequent deſtination." The order ſtated that ſhe was to go in ballaſt, or as light as ſhe could be loaded for ſea conſiſtently with her ſafety: and he had a liſt incloſed of "the ordnance, military ſtores, and rice" ſhe was to carry; and the ſhip was directed to be got ready with all poſſible expedition. But by another order of the 15th of *May* 1797 he was ſtill directed and authorized "*to have the propoſed works and alterations on board the ſhip executed*; the expence of which would be made good by the company." That the particular works and alterations directed by the ſaid orders of the 18th *April*, 24th *April*, and 15th *May* 1797, were done and performed by extra-carpenters at the company's expence; which was reimburſed by government to the company. On the 29th of *June* 1797 Captain *Dobree* was ordered to proceed with the *Buſbridge* to *Madras*, and "to take under "his convoy and command five other of the company's "ſhips for the purpoſes of the ſaid intended expedition." On the 20th of *July* the *Buſbridge* failed for *Madras*

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with two of those ships which were ready under her convoy; and having beaten up against the monsoons, with some damage to the ship at that season of the year, and loss to the owners, she arrived at *Madras* with the ships under her convoy on the 29th of *March* 1797, and Captain *Dobree* was immediately *ordered* by the *Madras* government "*to put himself under the command of Lieutenant* Kempt, *one of his majesty's officers*," and who had also been appointed agent of transports for the expedition by the *Madras* government. On the 2d of *September* 1797 *Lieutenant Kempt*, in consequent of previous orders from that government to Captain *Dobree* to receive him and his suit on board, for which it was said that a suitable compensation would thereafter be made, *came with his suit on board the* Busbridge, *and hoisted the king's pendant, and assumed the effective command of the ship*; *Captain* Dobree *from that time forwards until the termination of the expedition acting under his command.* The *Busbridge*, having received certain military stores and money on board, with directions to take in more and her allotment of troops at the place of rendezvous, sailed from *Madras* on the 3d of *September* for the harbour of *Pulo Penang*, the general place of rendezvous for the expedition, and arrived there on the 26th of *September*, and remained there under Lieutenant *Kempt's* orders until the 26th of *November* following, in company with the whole fleet, which was there assembled in great numbers; consisting of his majesty's ships of war, and of certain regular and extra ships of the company, and of the country vessels which had been taken upon specific freights by the governor-general in council for the said expedition. During this time the *Busbridge* was filled with soldiers and military stores. On the the 29th of

November

November Captain *Dobree* received orders from Mr. *Kempt*, then on shore, which had been communicated to him by the king's naval officer in command upon the expedition, to haul down the pendant and white ensign: and the whole expedition to *Manilla* having been abandoned, Captain *Dobree* sailed on the 26th with the troops and military stores on board from the said place of rendezvous back again to *Madras*, under convoy of his majesty's ship *Victorious*, and arrived at *Madras* on the 10th of *December*; and having landed the troops and stores, sailed again by orders of the government under convoy of his majesty's ship *Heroine* for *Bengal* river, and arrived there on the 25th of *January* 1798. In the course of this expedition the *Busbridge* received considerable damage, besides the loss arising from the delay of her homeward bound voyage. And on her arrival in the *Bengal* river a thorough repair, being necessary, was ordered to be made; and which was accordingly made at the expence of the owners. In consequence thereof, on the 2d *February* 1798, Captain *Dobree* received notice from the *Bengal* government, that the *Busbridge* was put out of the company's service from the 25th of *January* 1798 until such time as she might be in a condition to receive a cargo. These repairs were not finished till the 15th of *May* following; when, being reported by the company's surveyor fit to receive her homeward cargo, she was again taken into the company's service, pursuant to the terms of the charter-party. On the 7th of *July* 1798 the *Busbridge* was ordered to load her homeward-bound cargo in part at *Calcutta*, and proceed to *Madras* to take in the remainder. This was accordingly done; and the ship having completed her loading there was dispatched to *England* on the 17th of *October* 1798, and re-

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turned home on the 13th of *July* 1799, and made a right and true delivery of her cargo as required by the charter-party. A compensation for his own benefit was made to Captain *Dobree* in respect of his entertaining Lieutenant *Kempt* and suit on board the said ship, and which was reimbursed to the company by government.

The plaintiffs contended that during the whole or the greater part of the period from the 8th of *April* 1797 to the 15th of *May* 1798, the ship was not employed under the charter-party, but under a different and independent contract. The company on the other hand contended, that the ship continued during the whole of the time from her sailing from *England*, until her return and final discharge, under the charter-party; and that they are not bound to pay any thing beyond the demurrage provided for by the terms of it during the period that the ship was in their actual service, or so employed by the company upon the *Manilla* expedition: and such demurrage they have accordingly paid to the plaintiffs for all the said time, (except the period during which notice was given by them that the ship was out of their service; and during which excepted period the ship was under repair: that is, from the 25th of *January* 1797 to the 15th of *May* following,) in consequence of the damage sustained by her in the progress of such intended expedition to *Manilla*. It was agreed that no objection to the form of the action should be taken on account of the defendants being a corporation. The question reserved was, whether the execution of the charter-party of the 1st of *May* 1796, under the circumstances above stated, concludes the plaintiffs from recovering damages against the company for the services of the plaintiffs by the employment

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ment of their ſhip in the manner ſtated upon the *Manilla* expedition, and the loſs ſuſtained in conſequence thereof. If the Court were of opinion that the plaintiffs were entitled to recover, the quantum was to be ſettled by the arbitrators: otherwiſe, a nonſuit was to be entered.

Eaſt for the plaintiffs endeavoured to take this caſe out of the ſtrong printed words of the charter-party (which had inadvertently been ſuffered to remain uncancelled, though wholly inapplicable to a contract for one voyage only and for a ſpecific purpoſe) by contending, that though the ſhip were let by the owners to the company in *warfare* as well as in *trade*, and though there were an expreſs ſtipulation, (p. 19.) that "during the ſhip's ſtay "in *India* the company, preſidents, &c. ſhould have "liberty to employ her in trade, and alſo *in warfare or* "*otherwiſe* howſoever; and ſhould have liberty *to let* "*out the ſhip to freight* for the company's ſole benefit; yet giving effect to all the words, and attending to the general object and ſpirit of the charter-party, the true conſtruction of the inſtrument was, that though the company might themſelves employ the ſhip as they pleaſed in their own warfare, yet they were not at liberty to *let her out* to any other power for purpoſes of *warfare*; becauſe it was only ſtipulated in terms that ſhe might be let out *to freight*, which is in contradiſtinction to *warfare*. The change of phraze points to the diſtinction: the company's agents during the ſhip's ſtay in *India*, ſhall have liberty to employ her (that is in the employment of the company,) *in trade, and alſo in warfare or otherwiſe howſoever.* If the words had ſtopped there the company, though they might have applied the ſhip

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to any purpose to which a ship is in its nature applicable, in their own employ and under their own direction, yet they could not have let her out to be employed under the direction of any other: and this, which is the obvious intent of such a contract, and the fair construction of the words, is confirmed by the additional reservation of the liberty of *letting* her to *freight*. If then the parties had intended that the liberty of letting her out should be co-extensive with the prior liberty reserved to the company themselves of *employing* her, namely, "in trade, and also in "warfare, or otherwise howsoever," they would have used the same words again, or tantamount words of relation; but when they change the phraze, and only reserve the liberty of *letting* the ship *to freight*, that is a negative of the liberty of *letting* her out to *warfare*, or otherwise than as a *trading* vessel. For all the authorities (*a*) agree that *freight*, as such, is confined to the carriage price of goods conveyed in vessels, on the safe delivery of the goods: and therefore a letting for the purpose of warfare and exposure to destruction is inconsistent with a contract of letting for freight. In the same charter-party too the calculations of freight are made upon

(*a*) *Beawes' Lex Merc.* 118. *Freight* is the sum agreed on for the hire of a ship entirely or in part *for the carriage of goods* from one port to another. *Abernethey* v. *Landale*, *Doug.* 539. was a case where a ship was employed in a double capacity; as a merchantman upon a trading voyage, and as a privateer for warfare: and it was held that a sailor who had engaged to serve on board for certain wages during the voyage, and a share of prizes, was not entitled to any part of the wages if the ship were taken before she completed her voyage; although he was sent from the ship before her capture, as prize-master on board a vessel captured by her in the prior part of the voyage. For it was said that *freight* was the mother of *wages*, and *the safety of the ship* was the mother of *freight*. And in *Blakey* v. *Dixon*, 2 *Bos.* & *Pull.* 321., a declaration for the carriage-price of goods taken on board a ship, and agreed to be paid, on delivery *of the bill of lading*, by the name of *freight*, was held bad on demurrer; *freight* being only due on the delivery of the *goods*.

the

the tonage of goods carried; and shortly before the clause in question there is a stipulation that the company shall not be subject to any demand of the owners "on account of the ship's earnings *in freight voyages* for the company, or on account of *any other employment*;" which again must be understood of the *employment* of the company themselves; for the distinction is taken between *freight voyages* and *other employment*; and the liberty of letting out the ship is only reserved to the company for *freight*, and not for any other employment. The risks to the owners are very much multipled if the company may let the ship out to foreign warfare, as well as use her in their own warfare. The owners, knowing the trading character of the company, may very well calculate that they will not voluntarily engage in warfare of their own without adequate objects of justice and interest; but if they may let her to foreign warfare, there is a strong additional inducement to hazard the ship for objects in which they have no interest, and without the same checks on the abuse of the liberty. It will not vary the argument that the ship was here let to warfare to his majesty; for if the words can be construed to cover such a letting, they must equally extend to cover a letting to any foreign independent power within the limits of the company's charter. The facts stated in the case shew that she was let to warfare for the purpose of the *Manilla* expedition, and that the company have received hire of her from the king's government. That this was the king's warfare and not the company's, as a company holding an independent sovereignty in *India*; though individually the members of it are bound in common with the rest of the king's subjects to support his warfare against foreign nations. [Lord *Ellenborough* C. J. then

said

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said that whatever distinction of this sort might be entertained in *India*, this Court could make no distinction between the *East India* Company and the rest of his majesty's subjects, in respect of any assistance given by them in warfare to his government. The Court must therefore consider this as much the warfare of the company as any other warfare they might wage: and the case stated that the ships and forces of his majesty and of the company were *conjointly* employed on the expedition: and there was no previous letting of the ship by the company to government stated in the case.] The facts stated are evidence of a letting. He then contended that taking this to have been the warfare of the company, still they were liable to the owners for the actual service performed and damage sustained beyond the obligation of the charter-party: for the ship can only be employed under the charter-party *in her covenanted condition and character*, which were essentally altered by the directions of the company's government in *India* for the purpose of this expedition. She was covenanted to serve in the double capacity of a trading ship and a ship of war if required; but the proportion of her equipment, in the latter character was expressly defined by the terms of the charter-party, and in every other respect she was entitled to the benefit of a trading ship only. Her built was altered, and she was fitted to carry 36 guns of larger calibre, instead of the 26 of smaller calibre which she was covenanted to bear: her ordnance and ammunition stores would have been increased in proportion. She was engaged for the expedition in the exclusive character of a fighting ship; and though this new character was not ultimately imposed upon her, yet the alterations in her built were actually executed for the purpose: and by

being

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being thus enabled to carry more as a transport than she would otherwise have done, the wear and tear of the whole body of the ship was materially varied and increased. The charter-party contains heavy penalties for a deficiency of the covenanted force; but does not contemplate or authorize any excess of it. The case therefore which has happened must be considered as a new contract for the employment of the ship in a new character and condition. Then again, the whole scope of the charter-party shews that while acting under it, the ship was to continue under the command of the owners' officers; for though individuals may be displaced or restored for cause by the company's government, yet the next in degree is to succeed in rotation; and though none can be appointed who are disapproved by the company, yet the company themselves have no right to the appointment of officers in any case. But here the ship was taken from the command of the owners' officers, and placed under the command of the king's officer, who hoisted the king's pendant on board, and the owners' captain acted under his command. She therefore became to all intents a king's ship. This also shews that she was employed under a new and distinct contract, and not under the charter-party; for during that period few if any of the provisions of the charter-party were applicable to her.

The Court however were all satisfied that the ship continued under the charter-party, notwithstanding the alterations which were made on board of her in order to fit her more conveniently for the purpose of the intended expedition. They said, in substance, that as the company were authorized to employ her in warfare, they must necessarily

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necessarily have the power of fitting her for the purpose; and there was no distinguishing between additional works of this kind, and any alteration of a rope or plank on board, which it could not be pretended would annul the charter-party. The same answer, they said, applied to the placing the ship under the command of the king's officer. The company, or those in command, must necessarily exercise their discretion in this respect in the conduct of any warlike expedition in which they were engaged.

Postea to the Defendants.

Bosanquet was to have argued for the defendants.

Friday, Feb. 5th.

MULLETT and Another *against* SHEDDEN.

An *American*, properly licensed to export saltpetre from *Calcutta* to *America*, having insured it for the voyage, the ship was seized by the captain of a *British* ship of war at the *Cape of Good Hope*, and the cargo condemned, unshipped, and sold by order of the Court of Admiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captor's costs. Held that the assured might recover as for a total loss, without notice of abandonment; the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the *Cape* under the order of the Court there: and that such loss was recoverable against the underwriters on a count alleging it to have happened by the *unlawful seizure and detention of a* British ship of war: however questionable it might have been, if notice of abandonment had been necessary, whether such a notice, not given till after the receipt of a second letter from the *Cape*, announcing the condemnation, landing, and sale of the goods, were in time; when a prior letter of advice had stated the seizure and detention, on which no notice had been given. And held that the Court of appeal, allowing the captor his costs, on the reversal of the sentence of condemnation, did not the less shew the original seizure and detention to be *unlawful*, as alleged in the count.

THE plaintiffs declared, as agents, upon a policy of insurance subscribed by the defendant for 500*l.* upon ship or ships, at and from *Calcutta*, and all or any ports or places in the *East Indies*, to the ship's port of discharge in the United States of *America*, with leave to touch, stay, and trade at all or any ports or places on

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the other side or on this side the *Cape of Good Hope*, the *Brazils*, or elsewhere. The insurance was on 300 tons of saltpetre, valued at *6d.* per pound, and warranted free of particular average under 10*l.* per cent. The salpetre was averred to have been shipped on board the *Martha*, Captain *Beare*; the interest to have been in *J. P. Boyd*, and the loss stated by the *unlawful* seizure at the *Cape of Good Hope* and detention there of the ship and goods by a *British* ship of war. At the trial before Lord *Ellenborough* C. J. at *Guildhall*, at the Sittings after *Trinity* term 1810, a verdict was found for the plaintiffs, subject to the opinion of the Court on a case in substance as follows.

The *East India* Company, having the sanction of his majesty's government for the purpose, granted a licence to *J. P. Boyd*, or his order, to ship 300 tons of saltpetre from *Calcutta* to *America* for his own benefit, and as a reward for services performed by him to the company in *India*. It was accordingly shipped at *Calcutta* in *November* 1807, on board the *Martha*, Captain *Beare*, by the agents of the company; and the ship, having regularly cleared out at the custom-house, sailed from *Calcutta* upon the voyage insured, with the saltpetre on board, upon the 10th day of *January* 1808, and in the course of the voyage touched at the *Cape of Good Hope*, where she was detained by his majesty's ship of war the *Sceptre*, Captain *Bingham*, and libelled in the court of vice-admiralty there. On the 25th of *April* 1808 a sentence of condemnation was pronounced as to the saltpetre; which was thereupon unshipped and sold at the *Cape* for the benefit of the captors, under the decree of that court. The ship and the remainder of the cargo were restored, and proceeded on the voyage for *America*. On the 1st of

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March 1810 this sentence of condemnation, having been appealed against, was reversed by the lords commissioners of appeal in prize causes, on further proof of the property being in the claimants for *J. P. Boyd*; and the property was decreed to be restored or its value paid to the claimants for the use of the owner, "on payment of "the expences on behalf of *Joseph Bingham*, Esq. commander of his majesty's ship of war *Sceptre*, the captor, "and of his majesty in the office of admiralty in both "courts." On the 28th of *June* 1808 (*Boyd*, who is an *American*, being then in *America*) the plaintiffs who reside in *London* received the following letter dated at the *Cape of Good Hope* on the 19th of *March* preceding. "I suppose "your correspondents in *Calcutta*, Messrs. *Colvins, Bazett*, "and Co., have informed you they have shipped on board "my ship the *Martha*, bound to *New York*, according to "your directions, 300 tons of saltpetre on account of Mr. "*Boyd* a native-born citizen of the United States of "*America*. I think it is now my duty to inform you that "I arrived safe here on the 12th instant, and am sorry to "inform yon that Captain *Bingham* of his majesty's ship "*Sceptre* has detained the saltpetre, and ship in consequence of having this saltpetre on board, under the "idea (I believe) of its being *English* property. As you "have no agent here, I consider myself in duty bound "to claim in your behalf, and shall do every thing in "my power to get it cleared. It is the general opinion "here that they are proceeding in a wrong cause. I "have employed counsel on your behalf, and have every "reason to hope to have a hearing on the 4th of *April*. "I have protested against their proceedings in the "strongest manner possible, and if I cannot obtain justice for you in this colony, I shall appeal to *England*,

"where

"where I make no doubt but you will receive ample satis- 1811.
"faction for this unjust detention. I shall use my ut- MULLETT against SHEDDEN.
"most endeavours to bring it to a speedy decision here,
"and shall take every opportunity of informing you how
"the proceedings are carrying on, &c.

(Signed) "*J. M. Beare.*"

On the 19th of *August* 1808 the plaintiffs received the following letter dated the 11th of *May* preceding. "I refer "you to my letter of the 19th of *March* last, and am "now sorry to inform you that the court of vice-admi-"ralty of this colony has condemned the whole of the "saltpetre in the *Martha* as *English* property, from do-"cuments found on board a *Danish* prize ship. It is all "landed and to be sold next week. I leave Mr. *Anderson* to "act in my behalf and yours: he will send you through "my agents in *London* the copy of the condemnation, "with the expences I have already paid; which please "to pay his order. In case you should appeal from "this sentence, Mr. *Anderson* will render you every as-"sistance in the colony to procure such documents as "you may point out to him. The situation of our two "countries at this moment obliges me to leave this in "great haste. I have done every thing in my power to "save the property, but without effect.

(Signed) "*J. M. Beare.*"

"P. S. The document I allude to, found in the "*Danish* ship, was a letter from *Colvins* to you, which "was read in court; and great stress appeared to be laid "on an expression in that letter, that they wished success "to all parties concerned. And I was not furnished "with a single document to prove that either the salt-"petre was bonâ fide the property of Mr. *Boyd*, or that "he was a citizen of the United States."

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On the 19th of *August* the plaintiffs gave notice of abandonment to the defendant, who resides in *London*, and to the other underwriters: and it was agreed between the parties, that if the plaintiffs failed in recovering a total loss, a nonsuit should be entered, and no claim be made in this action for any partial or average loss. No part of the saltpetre insured, or of the proceed of the sale thereof, has been received from the *Cape of Good Hope* by the plaintiffs or *J. P. Boyd*. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover in this action a total loss? If they were, the verdict was to stand: if not, a nonsuit was to be entered.

The question meant to be raised by the parties was whether the notice of abandonment had been given in time: but when *Littledale* was about to argue for the affirmative on behalf of the plaintiffs, Lord *Ellenborough* C. J. asked whether there were not another previous question to be argued, namely, whether any notice of abandonment at all were necessary in this case where the subject-matter had been totally lost and destroyed?

Littledale said he was prepared to argue as well that no such notice was necessary here, where the voyage was lost when the first letter was written, and the subject-matter itself was afterwards lost when the second letter was received; as that the notice, if necessary, was given in time. But the Court desired to hear

Marryat, contrà; who said that he did not mean to contend that notice of abandonment was necessary if the case had stood alone on the receipt of the second letter

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upon the 19th of *Auguſt*; for at that time it would have been nugatory, as there was then a total loſs of the ſalt-petre, which that letter repreſented as landed and ſold under the decree of the prize court at the *Cape* in the *May* preceding. But if the owner's agents meant to abandon at all, in conſequence of the unlawful ſeizure by the *Britiſh* officer at the *Cape*, which is the loſs declared upon, they ought to have given notice of it on the receipt of the firſt letter of advice in the *June* preceding: the owner's right of abandonment is not renewed upon every new occaſion in the progreſs of the ſame loſs: and with reference to that period, the notice was out of time. The loſs was either occaſioned by the original detention, or by the condemnation: if by the latter, it is not within the declaration; if by the former, and ſo within the declaration, it could only become a total loſs by an abandonment within due time, which this was not. [Lord *Ellenborough* C. J. The aſſured ſtands upon the actual deſtruction as to him of the thing inſured, which precludes the neceſſity of any notice to abandon it. *Bayley* J. No circumſtance has happened ſince to make the original detention leſs than a total loſs.] He then contended that while the ſentence of condemnation remained unreverſed, it juſtified the detention; and though the ſubſequent reverſal ſhewed it to have been wrong as to the deveſting of the property, yet the reverſal being upon payment of the coſts of the ſeizing officer ſhewed that there was a good excuſe for the detention for the purpoſe of inſtituting the inquiry, and negatives the unlawfulneſs of the detention. In the admiralty courts there is always an ulterior queſtion, after a ſentence of condemnation is reverſed, whether the detention were proper; and that determines the conſideration of coſts.

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The sentence was only reversed here upon further proofs and subsequent information. [*Bayley* J. The further proof only related to the property: but the court of appeal had no doubt as to the condemnation being illegal.]

Lord ELLENBOROUGH C. J. The ultimate decision shews that the condemnation was illegal; and costs may be given to the seizing officer on other accounts than because the detention was legal. These courts may allow costs to a captor where there is a probable or meritorious cause. The sentence of condemnation is the only evidence in the case of the detention being lawful, and the subsequent reversal destroys that evidence, and affirms that the detention was unlawful; although, on probable cause, costs have been allowed: and then the underwriter is bound to make good the loss. Then, as to the point of abandonment; if instead of the saltpetre having been taken out of the ship and sold, and the property devested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought that there was much in the argument, that in order to make it a total loss there should have been notice of abandonment, and that such notice should have been given sooner: but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away.

The rest of the Court assenting,

Postea to the Plaintiff.

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The KING *against* The Inhabitants of HARBERTON.

Wednesday, Feb. 6th.

An order of justices for removing the *wife* and daughters of a pauper to the place of their settlement is supported primâ facie by shewing that the parish to which the removal was made was the place of settlement of the wife before her marriage; although it also appeared by a copy of the marriage register that the husband was therein described to be *of another parish*; (which description was held to be no evidence of his having a settlement there:) and such evidence throws the burden of proof upon the appellants, that the husband was settled in another parish.

A Case was reserved by the sessions in *Devonshire* for the opinion of this Court, in which it was stated that the parish of *Drewsteington*, in that county, appealed against an order dated 24th of *April* 1810, whereby *Elizabeth, the wife of* Charles Hill, and *Ann Hill* and *Elizabeth Hill*, her *daughters by her said husband*, were removed from *Harberton* in the same county to *Drewsteington*, as the place of their last legal settlement: and that upon the trial of the appeal the respondents proved that *Elizabeth Hill*, the wife, who before her marriage was called *Elizabeth Loram*, was born in *Drewsteington*, of parents living there. They also proved that on the 16th of *February* 1806 *she married* Charles Hill in the parish of *Chagford*; and from a copy of the registry of the marriage, which was produced, it appeared that he was therein described to be *of the parish of* Alverdiscott, *in the county of* Devon, *labourer*; and the said *Elizabeth* was therein described to be of the parish of *Drewsteington*. They also examined *Elizabeth Hill*, the wife, who proved that the children mentioned in the order were born after the marriage: and also that her husband, *Charles Hill*, was with her in *Harberton* a little after *Christmas* last; since which time he had left her, and she had not seen him since: that he was not there when she was examined before the justices previous to nor at the time of her removal, and that she did not know her husband's settlement. The chargeability of *Elizabeth Hill* and her children to *Harberton* was not disputed. The parish of *Harberton* here closed their case, without

giving

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giving any further evidence to account for the abſence of the huſband, or any further ſearch having been made for him, or inquiry as to his ſettlement. The pariſh of *Drewſteington* produced no witneſſes, nor did they offer any witneſſes of the huſband's ſettlement. The ſeſſions, after hearing counſel on both ſides, quaſhed the order.

Soon after this caſe had been opened at the bar, *the Court* ſaid that there could be no doubt but that the evidence, offered by the reſpondents, of the wife's maiden ſettlement was primâ facie ſufficient; and that it lay upon the appellants to rebut it by giving evidence of the huſband's ſettlement in a different pariſh: but the ſeſſions having decided againſt the reſpondents, upon the ſuppoſition that they had not uſed due diligence in endeavouring to procure the attendance of the huſband, or in accounting for his abſence, or inquiring as to his ſettlement; without going further into the conſideration of the caſe, this Court ſent it back to be re-heard by the ſeſſions, to give the appellants an opportunity of entering into their own caſe, and of giving evidence of the huſband's ſettlement. And the deſcription in the copy of the marriage regiſter of the huſband, that he was *of the pariſh of* Alverdiſcott, was conſidered to be no evidence of his having a ſettlement there.

Eaſt and *Gifford* were for the appellants. *Burrough* and *Harris* contrà.

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The KING *against* The Inhabitants of PRESTON.

Wednesday, Feb. 6th.

A substitute in the militia fraudulently and falsely declaring at the time of his enrolment, that he had no wife or family, when in fact he had a wife and one child, is not entitled to any parochial allowance for their relief, under the stat. 43 G. 3. c. 47. s. 2. & 5.

ON appeal against an order and certificate of a justice of the peace of the county of *Lancaster*, the sessions of that county set aside the order and certificate, subject to the opinion of this Court on the following case.

The order in question was made by the magistrate, directed to the overseers of the township of *Preston* in the county of *Lancaster*; and recited in substance, that *Ann Eastwood* of *Preston*, in the said county, had on the 10th of *February* 1810 made oath before the magistrate that her husband was a substitute then serving in the militia of that county, embodied and called out into actual service: that he was serving for the township of *Pilling* in the said county, and had left her and one child, *Ann*, born in lawful wedlock, and under the age of ten years, viz., about two years and a half, then dwelling in the said township of *Preston*, who were unable to support themselves. Therefore the magistrate ordered the overseers of *Preston* to pay the said *Ann Eastwood*, out of the poor's rates, 4*s.* weekly for the support of herself and child from henceforth till otherwise ordered. And the same magistrate certified, under the same date, to the overseers of the poor of the township of *Pilling*, in the said county, that he had made the said order for relief; and he thereby directed the last-mentioned overseers to reimburse the money so paid in pursuance of that order to the overseers of *Preston*. The case further stated, that *John Eastwood*, mentioned in the order, was, on the 28th of *November* 1807, enrolled in

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the 2d regiment of R. *Lancashire* militia as a substitute for *M. Gardner*, who had been regularly ballotted to serve in the militia for the township of *Pilling*, and has ever since such his enrolment served as a private soldier in that regiment, which, during the whole of that time, has been embodied and called out into actual service. At the time of his enrolment he *fraudulently and falsely* represented and declared, *that he had no wife or family*; he having at that time a wife and one daughter then and still dwelling at *Preston*: but he neither then had nor now has any other child. Application having been made by the wife and daughter for an allowance under the stat. 43 *Geo.* 3. *c.* 47.; and it appearing to the justice, to whom such application was made, that they were the wife and daughter of a person serving and enrolled in the militia of *England*, and unable to support themselves, he made the order and certificate appealed against. The proviso in the 5th clause of the statute, that the substitute shall undertake and make provision for the maintainance of his other children, to the satisfaction of the justice of the peace to whom application shall be made under the act for the relief of his family, was not complied with in any manner whatever. A demand having been made, in pursuance of the order and certificate above mentioned, the overseers of *Pilling* appealed against them to the sessions, being the next sessions after such demand.

The question turned on the 2d and 5th sections of the stat. 43 *Geo.* 3. *c.* 47. By the first of these, if any person serving or enrolled in the militia of *England* as a ballotted man or substitute, &c. shall, when embodied and called out into actual service, leave a family unable to support themselves, the overseers of the poor of the parish,

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rish, &c. where the family of such person shall dwell, shall, by order of a justice of the peace, pay to the family of every such militia-man, out of the poor's rates, a certain weekly allowance not exceeding the local price of one day's labour in husbandry, nor less than 1*s*. for every child born in wedlock, and under the age of 10 years; and at the like rate for his wife. But the 5th section provides, "that no allowance under this act shall be or-" dered or paid to the family of any substitute, &c. who " shall at the time of his enrolment have fraudulently " and falsely represented and declared, that he had no " wife or family; or to any substitute, &c. having more " than one child at the time of his enrolment, who " shall have fraudulently and falsely represented and " declared at the time of such enrolment, that he " had only one child: Provided always, that where " the substitute, &c. to whom any *such family* shall " belong, shall undertake and make provision for " the maintenance of his other children to the sa-" tisfaction of any justice of the peace, &c. it shall " be lawful for such justice to order the allowance " under this act to be paid in respect of the wife of " such substitute, &c. and of one child of such family " under the age of 10 years."

J. Williams was heard in support of the order and certificate of the magistrate, and contended that the intention of the legislature appeared from the whole of these clauses to be that, whether the militia-man made a fraudulent and false representation of the state of his family, or not, provision might be made to the extent of his wife and one child. That the words "*such family*," following the

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proviso at the end of the 5th clause, meant a wife and one or more children; and that the exclusion from the benefit of the provision, upon making a fraudulent and false representation of the state of his family, was only meant to attach on cases when there was a wife and more than one child. *The Court*, however, without hearing *Holroyd*, contrà, were clearly of opinion that the fraudulent and false declaration made by the militia-man in this case excluded him from the benefit of the act.

Lord ELLENBOROUGH C. J. It is only necessary to read the words of the act in this case; they are unpervertible: they refer as well to the case of a substitute who having a wife or child, or children, shall fraudulently and falsely declare at the time of his enrolment that he has no wife or family, as to one who, having more than one child, shall fraudulently and falsely declare that he has only one: in either case he is excluded from the benefit of the provision. But if he chuse to tell the truth at the time, that he has a wife and one child, they are to be provided for: or, if having more than one child, he undertakes and makes provision for the rest, the magistrate is empowered to order the allowance to be made for his wife and one child under the age of 10 years. This man then, having made the fraudulent and false declaration stated, is excluded from the benefit of the allowance by the plain terms of the legislature.

Per Curiam, Order of sessions confirmed, disallowing the order of the justice of the peace.

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The KING *againſt* The Inhabitants of ENGLEFIELD.

Wedneſday, Feb. 6th.

Where huſband and wife and their children were removed by an order of juſtices to the place of their laſt ſettlement, and that order was ſuſpended as to the huſband, until it ſhould be made appear that he was ſufficiently recovered to be able to travel; the wife and children being removed after his death, without any ſubſequent order removing the ſuſpenſion of the firſt order, is no reaſon for the ſeſſions to quaſh that order on appeal, nor to quaſh another order for payment of the charges of ſuch ſuſpenſion.

TWO juſtices made an order dated 21ſt of *March* 1809, for the removal of *Joſeph Timms*, *Elizabeth* his wife, and their two infant children by name, from *Englefield* in the county of *Berks*, to *Caſſington* in *Oxfordſhire*; and by another order of the ſame date, reciting that the ſaid *Joſeph Timms* was then unable to travel by reaſon of ſickneſs and infirmity of body, they ſuſpended (by virtue of the ſtat. 35 *Geo.* 3. *c.* 101. *ſ.* 2.) the execution of the firſt order as to *Joſeph Timms*, until it ſhould be made appear to them that he was ſufficiently recovered from his illneſs to be removed without danger; and afterwards they made a third order, dated 17th of *March* 1810, by which, after ſtating that it had been proved on oath before them that *Joſeph Timms*, named in the order of removal firſt-mentioned, died on the 7th inſtant, and that the reaſonable charges incurred by the ſuſpenſion of the ſaid order of removal amounted to 41*l.* 4*s.* 6*d.*, they directed the pariſh officers of *Caſſington*, to which the ſaid pauper was to have been removed, to pay thoſe charges to the pariſh officers of *Englefield*.

After the death of *Joſeph Timms* his wife and children were removed (*a*), under the firſt-mentioned order, from *Englefield*

(*a*) The proviſion made for the ſuſpenſion of orders of removal in the caſes provided for by the act of the 35 *Geo.* 3 *c.* 101. *ſ* 2 has been well confirmed, and the true ſpirit of it followed up, by the declaratory ſection (3) of the ſtat. 49 G. 3. *c.* 124., which, "in order to avoid any pre-"tence for forcibly ſeparating huſband and wife, or other perſons nearly "connected with or related to each other, and who are living together "as one family at the time of any order of removal made, or vagrant "paſs

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Englefield to *Cassington*; and on appeal by the latter parish against such order, and also the order for the payment of the charges, all the three orders above mentioned were quashed as insufficient, inasmuch as the order suspending the order of removal had not been itself taken off by an order of magistrates on the death of *Joseph Timms*; subject to the opinion of the Court on these facts.

Abbott appeared in support of the order of sessions, and *Burrough* and *Wakefield*, contrà. But the difficulty occurred upon the opening of the case, which the Court thought could not be gotten over, upon what ground

"pass granted, during the dangerous sickness or other infirmity of any "one or more of such family on whose account the execution of such "order of removal or vagrant pass shall be suspended;" enacts and *declares*, "That where any order of removal or vagrant-pass shall be suspended by virtue of this or of the said recited act, on account of the "dangerous sickness or other infirmity of any person or persons thereby "directed to be removed or passed, the execution of such order of removal or vagrant-pass shall also be suspended for the same period with "respect to every other person named therein who was actually of the "same household or family of such sick or infirm person or persons at "the time of such order of removal made or vagrant-pass granted." This, it appears, was the true sense of the original clause, which required and authorized the magistrates "making *such order of removal*, or granting *such vagrant pass*, to suspend the execution of *the same*, (*i. e.* of the "order or pass in toto,) until they were satisfied that *it* might safely be "executed without danger to *any* person who was the subject of the "same." But some magistrates having doubted their authority in this respect, it was thought better to put an end to all doubt by the declaration of the legislature as soon as a fit opportunity was presented by the introduction of the bill in question, which contains in other clauses several judicious additions to the former act. These and other laws of the like description are from time to time passed by a legislature, the individuals of which, for the most part, as well as those by whom such laws are put in force, contribute very largely to the expence created by them. They are founded no less in sound policy, than in justice and Christian duty. It is on occasions of sickness principally, or other accidental necessity, and in old age, that the honest labourer stands in need of this national and paternal care.

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The KING *against* The Inhabitants of ENGLEFIELD.

the feffions could quafh thefe orders, which upon the face of them were all good, when the real objection to the removal of the wife and two children, if any, was the want of another order of magiftrates taking off the fufpenfion of the original order of removal. The refpondent's counfel, indeed, fuggefted that the death of the hufband operated as a natural death to the order of fufpenfion: but the Court did not decide the cafe on that ground: and it was obferved, e contrà, that the terms of the order of fufpenfion did not apply to the cafe of death, but it was to operate till the fick perfon could be fafely removed. For the other reafon, however, the Court quafhed the order of feffions: and *Le Blanc* J. referred to the precedent of a permiffion to remove after an order of fufpenfion, given in the new edition of *Burn's Juftice*, as being beft adapted to fuch a cafe.

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Wednesday, Feb. 6th.

The KING *against* The Inhabitants of ST. PAUL, DEPTFORD.

Settling for 40 days upon a tenement at the yearly rent of 10*l.*, the landlord paying rates and taxes, will confer a settlement upon the tenant.

UPON an appeal against an order of justices removing *Richard Rice*, his wife and child, from the parish of *St. Paul, Deptford*, in the county of *Kent*, to the parish of *Greenwich*, the sessions quashed the order, subject to the opinion of the Court upon this case.

Richard Rice, the pauper, at *Christmas* 1807 rented a tenement of *E. Burford* in *Greenwich*, and resided upon it more than 40 days, under an agreement, by which it was stipulated that he should pay 10*l.* by the year to *Burford* for the said tenement, and that *Burford* should pay all taxes, rates, and charges whatsoever; which he did. The court of quarter sessions were of opinion, that if the taxes, rates, and charges, usually deemed tenant's taxes, are to be deducted from the 10*l.* which the tenant agreed to pay to the landlord, the said tenement was not of the annual value of 10*l.*: but if those taxes are not to be deducted, the said tenement was of the value of 10*l.*

Gurney, in support of the order of sessions, said that this case had been reserved, in order to bring under the revision of the Court the judgment in the case of *The King* v. *Framlingham* (*a*), which he admitted to be directly in point: but that was decided in the absence of Lord *Mansfield*, and at a time when the Court leant much in favour of settlements: but of late they have in all cases of doubt resorted to the words of the act of

(*a*) *Burr. S. C.* 748.

7 parliament:

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The KING *against* The Inhabitants of ST. PAUL, DEPTFORD.

parliament: and here it is clear, that if the landlord be to pay all the tenant's rates and taxes out of the 10*l.* annual rent reserved, *the yearly value* of the tenement cannot be so much as 10*l.*, which is necessary to confer a settlement by the words of the statute (*a*). It is the same thing whether the tenement be let for 9*l.*, the tenant paying 1*l.* for his own taxes; or whether the rent reserved be 10*l.*, the landlord undertaking to pay 1*l.* for the taxes payable by the tenant.

Taddy, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. If we were sitting to hear the case of *The King* v. *Framlingham* now argued, the argument might have weight; but it having been settled nearly 40 years ago that the rent reserved (all fraud apart) is to be taken as the criterion of the value of the tenement, without reference to the payment of the rates and taxes by the landlord, we are not now at liberty to disturb that decision upon any speculative opinion. The tenant may be said to obtain credit for a tenement in one sense of the yearly value of 10*l.*: and I cannot say that the former decision is so directly against the words of the act as necessarily to be wrong.

GROSE J. It is better stare decisis. The very case has been already determined.

LE BLANC J. If we were to decide against the former case, it would let in the deduction from the amount of the rent reserved of every payment to be made by the landlord which might have been thrown upon the tenant.

(*a*) 13 & 14 *Car.* 2. *c.* 12.

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The rule being settled otherwise, it is better to abide by it.

BAYLEY J. There is quite uncertainty enough in settlement cases; and when a point has been once decided, it is best to adhere to the decision.

Order of Sessions quashed.

Saturday, Feb. 9th.

The KING *against* MARSHALL and GRANTHAM.

The Court will not grant a rule nisi for a criminal information against a magistrate so late in the second term after the imputed offence, as to preclude him from the opportunity of shewing cause against it in the same term.

GARROW moved for a criminal information against the defendants, justices of the peace for the parts of *Lindsey* in the county of *Lincoln*, for having on the 24th of *October* last improperly, as it was suggested, granted an ale licence. The prosecutor had given the magistrates notice of the intended application to this Court on the 26th of *January*. But *the Court* now refused to entertain it, because it was made so late in the second term that the magistrates would have no opportunity of shewing cause in the present term against a rule nisi for an information, if granted. And *Le Blanc* J. read a note of a case of *The King* v. *Thomas*, *H.* 41 *Geo.* 3. which was a similar application against a justice of the peace; and because the offence was stated to have been committed in *October*, and the motion was not made till so late in *Hilary* term that there was not time for the magistrate to shew cause in that term against it, the Court refused to grant the rule (*a*).

(*a*) Vide *The King* v. *Harries and Another*, ante, 270.

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FORBES and Another *against* ASPINALL.

Monday, Feb. 11th.

The valuation upon a freight policy of insurance is calculated upon all the goods the ship is intended to carry upon the voyage insured; and if by a peril insured against the ship be lost, when part only of the goods, the freight of which was intended to be covered, was on board, the valuation must be opened, and the assured can only recover as for that proportional share; as where freight valued at 6500*l.* was insured on a ship from any port or ports in *Hayti* to *Liverpool*; and the ship, which had sailed with goods from *Liverpool* to *Hayti* on a voyage of barter, after exchanging a part of her outward cargo for 55 bales of cotton at one port of *Hayti*, proceeded with the same to another port, for the purpose of making a similar barter of the rest of the outward cargo, but was lost by a peril of the sea before it was effected; the assured was only entitled to recover for the freight of the 55 bales of the return cargo on board; though there was a moral certainty at the time, that the remaining part of her outward cargo would, except for the loss, have been exchanged for a full return cargo; for shortly after the loss of the ship, the goods saved from the wreck were in fact exchanged for more produce than was sufficient to have covered the freight insured.

But if there be a loss by a peril insured against of the *whole* subject-matter of the insurance to which the valuation applied, as of *all* the *intended* freight, where the insurance is on freight, the valuation in the policy will not be opened.

And in an action on a freight policy it seems sufficient to prove a contract under which the ship-owner would have been entitled to demand freight if the voyage were not stopped by a peril insured against.

THIS case came before the Court upon a motion for a new trial in an action on a policy of insurance, in which the plaintiffs had recovered a verdict at the sittings after last *Trinity* term at *Guildhall*. It was first moved in the last term, when a rule to shew cause was granted; and it was afterwards argued at length in the same term by *The Attorney-General*, *Scarlett*, and *Richardson*, on the part of the plaintiffs, and by *Park* and *Littledale* for the defendant. *The Court* took till this term to consider of their judgment; in delivering which the Lord Chief Justice went so fully into the arguments urged, and the cases cited at the bar, that it is unnecessary to repeat them.

The insurance, as it concerned this case, was on freight valued at 6500*l.* upon the ship *Chiswick* "at and from any port or ports in *Hayti* to *Liverpool*, or her port of discharge in the United Kingdom." The declaration alleged that on the 9th of *July* 1808 the ship was in safety in a certain port in *Hayti*, and that divers goods and merchandizes were then and there loaded on board to be

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Forbes *against* Aspinall.

carried on the voyage insured; that the plaintiffs were interested in the freight, &c. to the amount insured; and that on the 15th *July* the ship, with the goods on board, was lost by the perils of the seas, and the plaintiffs thereby lost their freight, &c.

The facts proved and admitted were that the plaintiffs were the owners of the ship *Chiswick*; that she sailed from *Liverpool* with the goods to *Hayti* to trade there, and to bring home a return cargo of produce, and arrived at *Hayti* on the 4th of *July* 1808 with goods to be there bartered for other goods to be brought back to *Liverpool*. Part of the goods were accordingly bartered and exchanged for 55 bales of cotton, which were shipped on board at *Jaquemel* (on the south side of *Hayti*:) the remaining part of her outward cargo was still on board, and would in all probability have been exchanged for other goods, but for the loss after-mentioned. That the ship proceeded from *Jaquemel* to *Au Cayes*, another port of *Hayti*, to barter away the residue of her outward cargo, and to complete her lading home; and with such cargo, and the 55 bales on board, was in safety on the 15th of *July*, when, by the perils of the seas, she was driven on shore and lost. That the defendant settled for the freight of the 55 bales of cotton, without prejudice to the plaintiffs claim for further loss of freight, if they were entitled to it. That the remaining part of the outward cargo, though damaged, was saved from the wreck, and, in twelve days after the loss of the ship, was exchanged for 250 tons of coffee and 100 tons of wood, the freight of which would have been of larger value than the sum insured on freight, if the ship had not been lost.

Lord

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court. 1811.

This was a motion for a new trial in an action upon a policy of insurance "at and from any port or ports in *Hayti* to *Liverpool*," &c. on *freight valued* at 6500*l.* The ship had sailed from *Liverpool* to *Hayti* with a cargo intended for barter; had bartered away part of her outward cargo, and taken in 55 bales of cotton in part of her return cargo; and was proceeding from one port in *Hayti* to another; viz. from *Jaquenel* to *Au Cayes*, to barter away the residue of her outward cargo, and to complete her lading home, when she met with an accident by the perils of the seas which occasioned a total loss. If the plaintiffs be only entitled to a satisfaction for a partial loss, that satisfaction has already been made, and a nonsuit should be entered. But the plaintiffs contend, that as this was a valued policy, and as part of the goods to be carried upon the freight insured were on board at the time of the loss, they are entitled to claim their verdict for a total loss. Freight is the profit earned by the ship-owner in the carriage of goods on board his ship; and an insurance upon freight is an insurance made in order to secure that profit to the ship-owner, in case he is prevented by any of the perils insured against from actually earning such profit. An insurance upon *freight* has no reference to the *hull* of the ship, or to its *outfit* for the voyage; both of which are protected by insurance upon the *ship*; but its sole object is to protect the assured from being deprived, by any of the perils insured against, of the profit he would otherwise earn by the carriage of goods. To recover, therefore, in any case upon a policy on freight, it is incumbent on the assured to prove, that unless some of the perils insured against had intervened

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to prevent it, ſome freight would have been earned; and where the policy is open, the actual amount of the freight, which would have been ſo earned, limits the extent of the underwriter's liability. In every action upon ſuch a policy evidence is given, either that goods were put on board, from the carriage of which freight would reſult, or that there was ſome contract, under which the ſhip-owner, if the voyage were not ſtopped by the perils inſured againſt, would have been entitled to demand freight: and in either caſe, if the policy be open, the ſum payable to the ſhip-owner for freight, together with the premiums of inſurance and commiſſion thereupon, is the extent to which the underwriters are chargeable. In this caſe, therefore, as there was no contract under which the ſhip-owner could claim freight but for goods actually ſhipped on the homeward voyage, the aſſured could have made no claim, had this been an open policy, but to the extent of the actual freight on the 55 bales of cotton, which were ſhipped for this country, and of the premiums and commiſſion thereon. And indeed that point has been ſettled againſt this very plaintiff in an action on an open policy on this very riſk, in *Forbes and Another* v. *Cowie*, in Mr. *Park's Addenda* to the laſt edit. p. 604. The queſtion then is, whether it makes any eſſential difference, that this is the caſe of a *valued* policy? And we are of opinion, upon full conſideration, that it does not. The object of valuation in a policy is to fix by agreement between the parties an eſtimate *upon the ſubject inſured*, and to ſuperſede the neceſſity of proving the actual value, by ſpecifying a certain ſum as the amount of that value. In fixing that ſum, if the aſſured keep fairly within the principle of inſurances, which is merely to obtain an indemnity, he will never go beyond

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the first cost, in the case of the goods; adding thereto only the premium and commission, and, if he think fit, the probable profit: and in the case of freight, he will not go beyond the amount of what the ship would earn, with the premiums and commission thereupon. The valuation however, in the case of goods, looks to *all the goods* intended to be loaded; and in the case of freight, it looks to *freight upon all the goods* the ship is intended to carry upon the voyage insured: and if by the perils insured against in a valued policy on goods, *part* only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of *that part*: and so, if by the perils insured against the *freight* of *part only* of the goods to be carried be lost, the assured can only recover in respect of that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation. If, for instance, the insurance be generally upon goods, and the goods intended to be protected be 500 hogsheads of sugar, and a valuation be made accordingly, but the ship by accident takes on board 100 only, and sails, and is afterwards lost by one of the perils insured against with those 100 board; can it be contended that the assured shall recover to the full amount of the valuation, that is for the whole 500, when he has lost only 100? So in the case of freight; if the ship would carry 500 tons, and in fixing the valuation the assured calculate his freight upon 500 tons, but when he reaches the loading port he can get 10 tons only upon freight, and sails upon the voyage insured with those 10 tons only; is it to be allowed, that if the ship be lost by any of the perils insured against, and he thereby lose freight upon 10 tons, he shall be entitled to the va-

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luation which includes the freight upon 500 tons? And yet to this extent the plaintiff's argument in this case is carried. The proposition is monstrous: instead of confining the policy, as it ought to be confined, to a contract as nearly as may be of indemnity, against what may be lost in respect of freight by the perils insured against, it converts it into a contract of indemnity against a different class of accidents, which may operate to prevent the assured from being able to procure a full cargo upon freight, and may make it the interest of the assured, which it never ought to be, that a loss should happen. The Court, therefore, will look for very strong authorities before they yield to such a proposition. It was pressed, upon the argument, that in the case of a valued policy, if any interest be proved to be on board, and there be no fraud, a total loss will entitle the assured to recover the sum specified in the valuation. And to that position we accede, with this limitation, that is, provided there is a total loss, by any of the perils insured against, *of the* WHOLE *subject-matter of insurance to which the valuation applied*; viz. of *all* the intended cargo of goods, where the insurance was on goods; and of *all* the intended freight, where the insurance was upon freight. But if it be meant to carry that position to this extent, that the underwriter is not at liberty to inquire *what* was *intended* to have been included in the valuation; or when he has ascertained that point, that he cannot reduce the sum below the valuation, by proving that *a part only* of what was included in the valuation has been lost by a peril insured against; we deny the position when so extended. In *Shaw* v. *Felton*, 2 *East*, 109., which has been strongly relied upon, the interest of the assured was in ship and outfit, including provisions and sea-stores laid

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in for ſlaves, and wages advanced to the crew: and the chief ground inſiſted upon for opening the policy was this, that the principal part of the proviſions had been conſumed in the voyage, and therefore had not been loſt by the perils inſured againſt. But that ground was reſiſted with effect, becauſe the ſubject inſured was to be conſidered as of the value *aſcribed to it when the voyage commenced*; and if the diminution of the proviſions were to be allowed to reduce the extent of the underwriter's liability upon the policy, every valued policy upon ſhip would be to be opened; becauſe every day, after the voyage commenced, the quantum of the ſhip's proviſions would be proportionably reduced. Mr. Juſtice *Lawrence*, in the opinion he gave, intimated diſtinctly, that upon an *open* policy ſuch a diminution would not have varied the underwriter's liability. That caſe, when examined, does not appear to have proceeded altogether, if at all, upon a diſtinction between *valued* and *open* policies; it was not decided upon the ground that if *part only* of the ſubject intended to be covered by the policy, and included in the valuation, were loſt by the perils inſured againſt, the policy could not be opened, and the liability of the underwriters apportioned; but upon this ground merely, viz., that in the caſe of an inſurance upon ſhip and outfit, if a total loſs of ſhip occurred by a peril inſured againſt, no deduction was to be made for proviſions, &c. expended in the voyage before the loſs occurred, or for the deterioration of the ſhip during that time; but that the underwriters were to be anſwerable for the original value, eſtimated in whatever manner ſuch original value might be, as though the loſs had occurred the inſtant after the policy attached. Indeed where a loſs occurs before any freight is earned, it would be un-

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just not to charge the underwriters to that extent, because by the event it has become of no avail to the assured that the provisions have been expended, and the ship used: and that case, as applied to the present, only decides, that the underwriter is chargeable to the same extent. The only remaining case relied upon by the plaintiffs, which is material to be considered, is that of *Montgomery* v. *Egginton*, which is shortly reported in 3 *Term Rep.* 362. That was an action on freight valued at 1500*l.* Freight to the amount of 500*l.* only was on board when the ship was lost; but goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose at the time. Lord *Kenyon* told the jury, that if this were a bonâ fide transaction, and not a mere colourable insurance, and a gaming policy, the assured was entitled to recover for the whole value in the policy. The jury gave a verdict for that sum: and though a rule nisi for setting aside the verdict was obtained, yet the opinion of the Court being strongly against the rule, it was afterwards abandoned. The grounds of this decision do not appear: whether it proceeded upon a distinction between valued and open policies is not expressly stated: and it might be that upon an *open* policy in such a case, Lord *Kenyon* and the Court might have thought that the assured would have been entitled to recover in respect of the freight on the goods on shore, as well as for the freight of those that were actually put on board. There might be circumstances in that case, which would have entitled the ship owner to full freight, had the owners of the goods on shore refused to let them be shipped, and the ship had failed with that part only which she had on board: there might have been a contract for giving the ship a full loading; or it might

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might have been confidered, (though it is difficult to fuppofe that it was,) that as the refidue of the goods to complete a cargo was ready to be fhipped, and lying on the quay for the purpofe, it was the fame to the affured as if they really had been fhipped. If that cafe, however, is to be confidered as having decided, that upon a policy eftimating the freight upon a *full* cargo at 1500*l.*, a lofs by a peril infured againft may be recovered to that extent, when a third only of a cargo is obtained, and freight to the amount of fuch third could only have been earned, and when it was uncertain whether more ever could have been procured; we fhould paufe long before we allowed ourfelves to adopt fuch a ground of decifion: we fhould hefitate extremely before we fhould fay, that 1500*l.*, the calculated amount of the whole intended rifk, fhould be paid for a lofs of 500*l.* incurred in refpect of a third of the intended rifk; in other words, that a *total* lofs fhould be paid for a lofs of *only one third* of that which the parties to the infurance contemplated as *the whole fubject infured*. It is fufficient however to fay, that that cafe is diftinguifhable from this in many of its circumftances. There a full cargo was ready to be laden, and the fhip in a ftate ready to receive it, and nothing but the perils infured againft did, or (as appears) could prevent its being received: here it was uncertain whether any additional cargo could have been ever procured, and the outward cargo muft alfo have been difcharged before the homeward cargo could have been completed: fo that the fhip was not ever in a condition to receive her homeward cargo, if the cargo had been ready, which it never was, to have been put on board. In a cafe therefore circumftanced as this is, where the valuation was with reference to freight upon a *complete* cargo; where a complete cargo, or any thing

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like a complete cargo, never was in fact obtained, and for all that appears never might have been obtained; where there was no contract by any person to load a complete cargo, or pay dead freight, but the ship was a mere seeking ship; we cannot feel ourselves warranted in saying, that there has been a *total* loss by any peril insured against of that which the insurance was intended to cover, and which the valuation contemplated, viz., *Freight upon a complete cargo*; but are obliged to pronounce, that no loss by the perils insured against is made out beyond the loss of freight upon part of a cargo only, viz., upon the 55 bales of cotton: that the assured are therefore not entitled to recover a total loss, but an apportionment only, according to the measure of their actual loss: and as that apportionment has been already allowed to the plaintiffs, that there must be a new trial case.

Monday, Feb. 11th.

USPARICHA *against* NOBLE.

A native *Spaniard* domiciled here in time of war between this country and *Spain*, having been licensed in general terms by the king to ship goods in a neutral vessel from hence to certain ports of *Spain*, such commerce is legalized for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his correspondents, though residing in the enemy's country; and such goods may, therefore, be insured by him, either on his own account, or as agent for them: and he may sue and recover upon the policy in his own name in case of a loss by capture: and this, though the prize, which was taken by a *French* privateer (*France* being a co-belligerent with *Spain* in the war, and both governments having issued similar decrees against *British* commerce,) was afterwards condemned by a *French* consular court then sitting in a port of *Spain*, into which the prize was carried: for in respect of the purposes of such licensed trading, the subjects of *Spain* concerned in it are to be regarded as *British* subjects.

THIS was an action on a policy of insurance on fish on board the *Prussian* ship *Carlota*, at and from *Poole* to *St. Andero* and *Bilboa*, both, or either, subscribed by the defendant for 150*l*., on the 29th *Feb.* 1808, a copy of which policy was annexed to this case. The declaration contained three counts; in the first, the interest was averred

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to be in *Lemona Uria* and *Francis Joze de Uriarte*; in the second, in the plaintiff and *F. J. de Uriarte*; and in the third, in the plaintiff alone: and the loss was alleged to be by capture. At the trial at the sittings after last *Michaelmas* term at *Guildhall*, before Lord *Ellenborough* C. J. a verdict was found for the plaintiff, for 137*l.* 10*s.*, subject to the opinion of the Court upon the following case:

The plaintiff is a *Spaniard* by birth, but has been domiciled as a merchant in this country for the last eight years. In *February* 1808 the plaintiff purchased (*a*) 5400 quintals of fish, and shipped the same in the *Prussian* ship the *Carlota* for *St. Andero*, in consequence of orders from the agent of Mr. *Lemona Uria*, a merchant resident in *Bilboa*, and Mr. *Uriarte*, a *Spanish* gentleman resident at *Vera Cruz* in *Spanish America*, but who was in *England* at the time of the purchase and shipment, upon a temporary occasion. Mr. *Lemona Uria* was interested in the cargo in the proportion of 5-8ths, and Mr. *Uriarte* in the proportion of 3-8ths. The plaintiff has received payment from Mr. *Uriarte*, but not from Mr. *Lemona Uria*. On the 21st of *December* 1807 the *British* government granted a licence for the ship *Carlota* with her said cargo to proceed on the voyage in question. By the decrees of the *French* and *Spanish* governments at the commencement of the war with *Great Britain*, all ships and goods coming from *England* were declared lawful prize. The *Carlota* sailed from *Poole* on the 28th of *February* 1808; and while in prosecution of her voyage, was captured (without the limits of the ports of *St. Andero* or

(*a*) It was agreed in the course of the argument that the goods were purchased and shipped by the plaintiff, on account of his correspondents, and not on his own account.

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Bilboa) by two *French* privateers belonging to *Bayonne*, and was carried into *Castro*, a port of *Spain*, where the ship and cargo were condemned and sold by the sentence of a *French* consular court, held in *Spain*, on the 8th of *June* 1808. At the time of the capture and condemnation *France* and *Spain* were co-belligerent allies at war with this country. The question was, whether the plaintiff were entitled to recover? If he were so entitled, the verdict was to stand: if not, then the verdict was to be set aside and a nonsuit entered. The policy referred to was in the common printed form, and was stated to be made by the plaintiff, as well in his own name, as for and in the name and names of all and every other person or persons to whom the same did, should or might, appertain, for himself and them and every of them, at 10 guineas per cent.: and liberty was reserved for the ship "to "have any clearances and carry any simulated papers:" and also it was "lawful for the said ship in the voyage "to proceed and sail to, and touch and stay at any ports "or places whatsoever and wheresoever to load, unload, "and reload goods, without being deemed a deviation." At the conclusion the insurance was stated to be "1000*l*. "on 5400 quintals of fish valued at 6000*l*., warranted "free of seizure in the ports of *Bilboa* and *St. Andero*; "to pay a loss within two months after such detention, "without waiting for condemnation or restitution." And the king, by his licence referred to, reciting that "whereas *Manuel de Munez y Usparicha* (the plaintiff) "hath humbly represented to us that he is desirous of "obtaining our royal licence for permitting the *Prussian* "ship *Charlotte*, *M. F. J.* master, of about 300 tons "burthen, to proceed from *Poole* to *Bilboa* or *Santander*, "with a cargo of fish and such goods as are permitted "by

"by virtue of our order of the 11th of *November* 1807 "to be exported;" thereby directed the commanders of all his ships of war and privateers "not to interrupt "the said vessel, but to suffer her to proceed as afore-"said." This licence was to remain in force for four months, and at the expiration thereof, or sooner if the voyage were before completed, was to be deposited with the commissioners of the customs at the port of *London*, or with the collector of the customs at the out-ports. Dated 21st *December* 1807.

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Barnewall for the plaintiff, after observing that the plaintiff's claim was resisted on the principle laid down in *Conway* v. *Gray and Others* (a), that the assent of every subject is virtually implied to every act of his own government, and therefore that a foreigner could not recover here upon a policy of insurance where the loss happened by the acts of the government to which he was subject; contended that that principle did not apply to this case, where the capture to which the loss was to be attributed was made by a *French* and not by a *Spanish* force: and though the *French* and *Spanish* governments had a common interest at the time for some purposes, yet the fact of their being co-belligerent allies in the war against this country did not so far identify the subjects of *Spain* with the government of *France* as to make them answerable for its acts within the principle of that case. Neither will the condemnation of the vessel by the *French* consular court sitting in *Spain* work that effect; for the loss was by the capture and not by the condemnation, and that condemnation was in the name and by the authority

(a) 10 *East*, 536.

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of the *French* and not of the *Spanish* government. But at all events the effect of the king's licence was to make the licensed *Spaniard* an alien friend instead of an alien enemy, and thereby to except him from his implied responsibility for the acts of his native government. As to him the licence operated as a suspension of the war (*a*) pro hac vice: for as Ld. C. J. *Treby* said in *Wells* v. *Williams* (*b*), " the king may declare war against one part of the subjects of a prince, and may except the other part; and so has he done in the (then) war with *France*; for he has excepted in his declaration all the *French* protestants; and of such proclamations all ought to take notice, because the war begins only by the king's proclamation." According to this it would not have been competent to have objected to an alien plaintiff so circumstanced, that his property had been captured even by his own countrymen out of the pale of the king's protection. The licence here operates in the same way and to the same extent, for the purpose for which it was granted. The object of the *British* government in granting it was that this trade should be carried on in contravention of the laws of *Spain*: the instruments of doing this meritorious act towards the *British* government were the subjects of *Spain*, who thereby incurred the risk of punishment for the violation of the laws of their own country: they could not have insured them for all the purposes of the licence, therefore the licensee must be considered as an alien friend; and public policy as well as fair dealing is on his side. He referred to *Kensington* v. *Inglis* (*c*), where a trading with an alien enemy for specie and goods to be

(*a*) He cited Sir *W Scott*'s judgment in the case of the *Hoop*, 1 *Rob. Adm. Rep.* 201, 2. referring to *Bynkershoek*, b 1. c. 7.

(*b*) 1 *Ld. Ray.* 282. (*c*) 8 *East*, 273.

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brought from his own country in his ſhips into our colonial ports, having been licenſed by the king; ſuch licence was held to legalize incidentally an inſurance on the enemy's ſhip as well as on the goods and ſpecie put on board for *Britiſh* ſubjects; and that it was competent for the *Britiſh* agent for both parties, in whoſe name the inſurance was effected, to ſue upon the policy in time of war; he being under no perſonal diſability to ſue, and the truſt being lawful.

Richardſon, contrà, contended that this caſe came directly within the principle of *Conway* v. *Gray* (*a*) and the other caſes decided at the ſame time, by which every foreign ſubject was conſidered as a party to the acts of his own government, and therefore precluded from recovering upon a policy of inſurance for a loſs occaſioned, as it may be ſaid, by his own act. This principle was eſtabliſhed without any relation to the queſtion of neutrality; for it would apply as well to the caſe of a friendly as of a hoſtile alien. [*Le Blanc* J. aſked if the argument were meant to be applied to all the perſons in whom intereſt was averred, as well to the factor reſident here, as to thoſe abroad?] The factor *Uſparicha*, to whom the debt is due from his correſpondent at *Bilboa*, has no inſurable intereſt in the goods on that account, as was holden in *Lowrie* v. *Bourdieu* (*b*); but he has his remedy againſt his principal who employed him to make the purchaſe. The plaintiff inſured merely in the character of agent. [*Bayley* J. If he purchaſed in his own name, he would have a right to ſtop the goods in tranſitu.] He could only do that in the event of bankruptcy or inſolvency; but ſuch a right would not

(*a*) 10 *Eaſt*, 536. (*b*) *Dougl.* 467.

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give him an insurable interest: it would only make him a creditor of those persons for whom he shipped. [Lord *Ellenborough* C. J. observed, that it did not appear here whether the plaintiff had purchased the goods in his own name, or on his own credit, so as to make himself liable for them to the vendor, in which case he might retain them while in transitu (*a*): and if any thing turned upon that fact, it ought to be ascertained and stated in the case.—*The Attorney-General* said, that the goods were shipped on account of the plaintiff's correspondents, and not on his own account. And after some discussion as to the fact between the counsel at the bar, Lord *Ellenborough* C. J. said, he thought that the case must be taken as if the plaintiff had no interest in the property at the time; and then it stood as an insurance on enemy's property; which brought the question to the effect of the king's licence.] If this were a question upon the legality of the voyage, the licence would bear materially upon it; but upon the principle which governed the case of *Conway* v. *Gray*, it is immaterial whether the parties interested were hostile or neutral: if they be answerable for the act which occasioned the loss, they cannot recover against the underwriter. Now here not only did the *Spanish* government concur in the act of seizing the *Spanish* property in a neutral ship, committed by the *French* privateer, by the sanction previously given under their own decree (*b*) for that purpose, in conformity to the *French* decree; but they also consented to the condemnation of it by lending their territory for this purpose; and the *French* consular court which sat in *Spain*

(*a*) Vide *Feise* v. *Wray*, 3 *East*, 93.

(*b*) It was admitted that the *Spanish* decree followed the terms of the *French* decree, stated in *Barker* v. *Blake*, 9 *East*, 284., but without any reference from the one decree to the other.

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could only derive its efficacy from the *Spanish* government: such consent results too from the character of co-belligerent (*a*).

Barnewall in reply. It was equally a loss by capture whether followed by condemnation or not. It would have been the same if the capture had been made by pirates. This case is distinguishable from *Conway* v. *Gray*, and the other cases of the *American* embargo; for there the cause of loss was not within the contemplation of the parties at the time of subscribing the policies; but here it was contemplated by them: for here the fish was warranted free of seizure in the ports of *Bilboa* and *St. Andero*; from whence it is to be inferred that the parties looked to the chance of seizure and confiscation in other ports of *Spain*: and the underwriters further engage "to pay the loss within two months after such detention, without waiting for condemnation or restitution." The defendant therefore was liable before any act done by the *Spanish* government to confirm the seizure. If the trade be licensed, it follows that it may be protected by insurance: but it would be absurd and contradictory to say that an insurance for the *Spanish* subject is lawful, if his suit to enforce it may be defeated because he is a *Spanish* subject.

Lord ELLENBOROUGH C. J. observed that the licence was given to a *Spanish* subject domiciled here, and did not extend to every *Spanish* subject resident elsewhere. But as the principle on which the cases on the *American* embargo were decided had been much pressed upon the Court in

(*a*) The case of *Oddy* v. *Bovill*, 2 *East*, 473., and the several cases there cited of adjudications in the Admiralty Court upon this subject were referred to.

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the argument, although at present it appeared to him that this case was distinguishable from those, they would consider further of it before they delivered their opinion. And afterwards in this term his Lordship gave judgment. (After stating the facts) :—

It appears by the case that this was an action brought by a native *Spaniard* domiciled here in time of war with *Spain*, and specially licenced by his majesty for the purpose of the very commerce which it was the object of the policy declared upon in this action to insure. The case cited of *Wells* v. *Williams*, 1 *Lord Raym.* 282. establishes that a plaintiff, an alien enemy in respect of the place of his birth, may, under similar circumstances of domicile, be allowed to sue in our courts. The legal result of the licence granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, but that the commerce itself is to be regarded as legalized for all purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honor of the crown. The crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war: and its licence for such purpose ought to receive the most liberal construction. To say that the plaintiff might export the goods specified in the licence from *Great Britain* to an enemy's country for the benefit of himself *or others*, (and the licence contains no restriction in this particular;) and yet to hold that where he has so done, he could not insure; or, having insured, could not recover his loss, either on account of his original character of a native *Spaniard*, or on account of the places to which, or of the persons to whom the goods

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were destined; would be to convert the licence itself into an instrument of deception and fraud. The crown, in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end. For adequate purposes of state policy and public advantage, the crown, it must be presumed, has been induced in this instance to license a description of trading with an enemy's country, which would otherwise be unquestionably illegal. Whatever commerce of this sort the crown has thought fit to permit (which in respect of its prerogatives of peace and war, the crown is by its sole authority competent to prohibit or permit,) must be regarded by all the subjects of the realm, and by the courts of law, when any question relative to it comes before them, as legal, with all the consequences of its being legal: one of which consequences is a right to contract with other subjects of the country for the indemnity and protection of such property in the course of its conveyance to its licensed place of destination, though an enemy's country, and for the purpose (as it probably will be in most cases) of being there delivered to an alien enemy, as consignee or purchaser. In the present case the licence was obtained for the purpose of protecting the subject-matter insured in the course of its conveyance by sea from *England* to certain ports in *Spain*, to be there delivered to the purchasers thereof, who are the persons in whom the interest is averred in the first and second counts of this declaration: and the action is well brought, upon the principles above stated, in the name of the plaintiff for their benefit. For the purpose of this licensed act of trading, (but to that extent only,) the person licensed is to be regarded as virtually an adopted

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ſubject of the crown of *Great Britain*; his trading, as far as the diſabilities ariſing out of a ſtate of war are concerned, is *Britiſh* trading; and of courſe any argument to be drawn from a virtual participation in and ſuppoſed privity to the acts of his own native country, then at war with the crown of *Great Britain*, is excluded or ſuperſeded in point of effect by an expreſs privity to and immediate participation in the adverſe acts of the *Britiſh* government. As far as the plaintiff and the *Spaniſh* purchaſers of this cargo are concerned, they are actually privy to the objects of the *Britiſh* government, and acting in furtherance thereof, and in direct oppoſition to the laws and policy of their own country. And it will not be contended to be illegal to inſure a trade carried on in contravention of the laws of a ſtate at war with us, and in furtherance of the policy of our country and its trade; and which this trade in queſtion, ſanctioned as it is by his majeſty's licence, muſt be deemed to have been. It is not therefore neceſſary to conſider upon this occaſion the ingenious ſuperſtructure which has been endeavoured to be raiſed on the determination of this Court in the caſe of *Conway* v. *Gray*, 10 *East*. Nor, (if the principle of that caſe did at all apply to the preſent, circumſtanced as it is in conſequence of his majeſty's licence,) how far its operation might be reſtrained or affected, as has been argued, by the particular proviſion in this policy, that "in caſe of capture, "ſeizure, or detention, the underwriter ſhould pay a "loſs within 2 months, without waiting for condem- "nation or reſtitution." All theſe points are immaterial, with a view to the judgment upon this caſe, provided the property inſured be in virtue of the king's li-

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cence, for the purpose of the insurance, to be considered as fully legalized: and we are clearly of opinion that it ought to be so considered.

Judgment for the Plaintiff.

HARRISON *against* WRIGHT.

Monday, *Feb.* 11th.

In assumpsit upon a memorandum for a charter-party, describing the agreement of the defendant, the ship owner, to proceed with all convenient speed to a foreign port, and there load, within 20 running days, a cargo from the plaintiff's factors, and therewith return home, and in 15 running days deliver the same, on payment of certain freight, concluding with a certain *penalty for non performance*; held that the plaintiff might recover damages on the breach of the contract, in the defendant's not permitting the vessel to proceed on the voyage, beyond the amount of the penalty.

THE plaintiff declared in assumpsit upon the following agreement in writing: — "Copy of memorandum for charter party. *Hull*, 27th of *March* 1809. It is this day mutually agreed between *J. Wright*, owner of the ship *Hayle* of about 232 tons burthen, now lying at *Shields*, and whereof ——— is master, and *R. Harrison* of *Hull* (the plaintiff), that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all covenient speed, sail and proceed to *Westerwick* in *Sweden*, or as near thereto as she can safely get, and there load in 20 running days (if not sooner dispatched) from the factors of the said *R. Harrison*, the freighter, a full and complete cargo of deals, but not exceeding what she can reasonably stow and carry over and above her tackle, &c.; and therewith return to *Hull*, and in 15 running days deliver the same, on being paid freight for the same, at the rate of 26*l.* per hundred of 14 3-inch 9½ board deals [restraints of princes, dangers of seas, &c. excepted;] with 2-3ds port charges and pilotage as customary: one half of the said freight to be paid on the unloading and right delivery, and the remainder in 4 months following Demurrage 6*l.* per day. *Penalty for non-performance* 300*l.* It is also further agreed between the said parties, that the said merchant shall

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have liberty to keep the ſaid ſhip 10 days on demurrage at 6*l.* per day for every day's detention over and above the days aforeſaid. If the veſſel be loaded and delivered in 35 days, no demurrage to be charged." — And then the plaintiff alleged as a breach of ſuch agreement, that the defendant did not permit the *Hayle* to ſail or proceed on the ſaid voyage; and laid his damages at 3000*l.* At the trial at *York* the plaintiff took, by conſent, a verdict for 3000*l.* damages, ſubject to the award of an arbitrator to reduce that ſum; and the verdict was to be entered for ſuch ſum only as the arbitrator ſhould find to be due from the defendant to the plaintiff. The arbitrator, after hearing evidence offered by the plaintiff as to the amount of the loſs incurred by him by the non-execution of the contract on the part of the defendant, awarded to the plaintiff 1860*l.*, and the taxed coſts of the reference; though it was objected before him that no more than 1300*l.*, the amount of the penalty as liquidated damages, could be recovered.

Topping thereupon, in the laſt term, obtained a rule upon the plaintiff to ſhew cauſe why the award and verdict entered for him ſhould not be ſet aſide, upon the defendant's bringing into court 560*l.* to abide the further order of the Court, and alſo forthwith paying to the plaintiff 1300*l.*; in order to take the opinion of the Court upon the point of law, whether the penalty in this caſe limited the amount of the damage recoverable upon the agreement; as he contended that it did. But there were alſo affidavits filed on each ſide as to the merits of the award, in reſpect of the real amount of the damage.

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Park, *Holroyd*, and *Scarlett* ſhewed cauſe on *Saturday* laſt againſt the rule; and admitting that a party might limit his liability, contended that the addition of a penalty to the non-performance of a covenant or contract was not intended to limit the liability of either party for a breach of his part of the contract, but to give the injured party his election either to ſue for general damages or to recover the penalty. Lord *Mansfield*, in *Lowe* v. *Pears* (*a*), ſtates "the difference between covenants in general and covenants ſecured by a penalty or forfeiture: in the latter caſe the obligee has his election; he may either bring an action of debt for the penalty and recover it; (after which he cannot reſort to the covenant, becauſe the penalty is to be a ſatisfaction for the whole;) or if he do not chuſe to go for the penalty, he may proceed upon the covenant, and recover more or leſs than the penalty toties quoties." The ſame principle was laid down in *Cotterel* v. *Hook* (*b*); but there the bond and deed of covenant to ſecure an annuity were by different inſtruments. But this very point ſeems to have been determined in *Winter* v. *Trimmer* (*c*), which cites *Bird* v. *Randall* (*d*). Now here the word *penalty* ſhews that the 1300*l.* was not meant to be taken for liquidated damages (*e*). If the caſe had been reverſed, the defendant would not have conſidered that his demand for freight according to the ſtipulated rate was limited by the penalty, if in fact he had earned more. And the very nature of the contract ſhews that the 1300*l.* penalty could not be meant for liquidated damages; for then, if there had been a breach of any part of the contract at the beginning of the voyage, the 1300*l.* would have been immediately due to the other party;

(*a*) 4 *Burr* 2228. (*b*) *Dougl.* 101. (*c*) 1 *Blac Rep.* 395. (*d*) *Ib.* 373. (*e*) *Smith* v. *Dickenſon*, 3 *Boſ.* & *Pull* 6,0

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which would in effect have made an end of the charter-party; for he could have no remedy upon it for any number of subsequent breaches in the progress of the voyage, though he might have been damaged to a much greater amount.

Topping and *Hullock*, contrà, said that this, like every other contract, must be construed according to the apparent intent of the parties, and there could be no reason for introducing into it a penalty of 1300*l.* for non-performance, unless it was meant to limit the responsibility of the parties to that sum. [*Bayley* J. It is difficult to say that, when the full freight would amount to more.] It is the party's own fault, if he do not take care to have the penalty large enough to cover all possible damages and demands. It is an agreement between the parties that the damages shall not exceed 1300*l.*, as in *Marsden* v. *Gray* (*a*). At one time it was considered that the party grieved had an option to proceed for the entire penalty, or to assign breaches and go for damages on the statute of *William* (*b*): though it is now clearly settled (*c*) that the plaintiff suing upon the contract must assign breaches upon the statute: but there is no case where a penalty is given in which a plaintiff has been permitted to recover more. The plaintiff might have declared in debt for the penalty, and he cannot alter the legal effect of the instrument by declaring in assumpsit. It would have been nugatory to hold that a plaintiff declaring in debt was bound to assign breaches under the statute, if he could elude the statute altogether by declaring in assumpsit (*d*).

(*a*) 6 *East*, 564. (*b*) 8 & 9 *W.* 3. *c.* 11. *s.* 8.

(*c*) Vide *Walcot* v. *Goulding*, 8 *Term Rep.* 126., and other cases there referred to.

(*d*) *Astley* v. *Weldon*, 2 *Bos.* & *Pul.* 346.

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But in *Wilbeam* v. *Ashton* (*a*), where the plaintiff declared in assumpsit upon an agreement by the defendant to serve him for 4 years under a penalty of 50*l*. Lord *Ellenborough* held that no compensation could be given beyond the penalty: though that case ultimately went upon another point. [His Lordship asked whether the penalty were contained in the same clause with the covenant in that case: to which *Topping* answered that he had seen one of the briefs in the cause, and that the penalty was given at the end, in the same manner as in the present case.] Here the party contracted to do a single act, namely, to send his ship out for the deals, and he engaged to do that under a penalty of 1300*l*., beyond which he would not undertake to be chargeble. [Lord *Ellenborough* C. J. This is not a contract for one specific act; for the ship was contracted to sail with convenient speed to her destined port, where she was to load within a certain time, and then to return to *Hull*, and in 15 running days deliver the same: and by the breach of each of these the plaintiff may sustain damage.]

Cur. adv. vult.

On this day Lord ELLENBOROUGH C. J. said that on looking into the case of *Winter* v. *Trimmer*, to which they had been referred, it appeared to be so exactly in point, that it was only necessary to read it: [which having done his lordship continued —] There the question immediately was whether the plaintiff could recover more than the penalty: and it was ruled that he might. And a prior case of *Bird* v. *Randall* was referred to, of which it is not necessary to read more than what was said by Mr. Justice *Wilmot*; that the plaintiff had his election to

(*a*) 1 *Campb. N. P. Cas.* 78.

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bring covenant, or debt for the penalty: but having chosen to bring debt, he could not resort back to the covenant. That was followed up by the case of *Astley* v. *Weldon*, in which it was laid down that the plaintiff had his option either to proceed upon the covenant, toties quoties; or upon the first breach to proceed at once for the penalty, out of which he might be satisfied for the damage actually sustained, and which would stand as a security for future breaches. The penalty therefore is auxiliary to the enforcing performance of the contract; and the party grieved may either take the penalty as his debt at law, and assign his breach under the statute of *William*; or he may bring his action for damages upon the breach of the contract. Though to be sure the advantage of taking judgment for the penalty as the debt at law is very much cut down by the statute of King *William*. Upon the whole, therefore, we think that the arbitrator was warranted in awarding the sum which he has given to the plaintiff.

Rule discharged.

Monday, Feb. 11th.

GULLETT *against* LOPES, Bart.

Where one of two adjoining commons, with common of vicinage, was inclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other; yet as the separation was not complete, so as to prevent the cattle straying from one to the other by means of the highway, the common by vicinage still continued.

THE question in this case concerning a right of common, by reason of vicinage, arose upon the face of an award, which recited in substance, that a suit in replevin had been instituted in the sheriff of *Devon*'s court, between these parties, touching the distraining and impounding of the plaintiff's cattle by the defendant; which

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which suit was removed into this court, and was referred to the decision of the arbitrator; who, in his award, set forth that it was proved before him, that immemorially, until the inclosure and division after-mentioned, *Roborough* common and *Axler* common in *Devonshire* adjoined each other, without any separation by a fence on the side of *Axler* common, towards the north and east; and that until such inclosure and division the cattle of the commoners, on either of the commons, wandered by reason of vicinage into the other. That in 1802 the defendant, Sir *M. M. Lopes*, being seised of *Axler* common, inclosed and divided it with fences on the north and east sides from *Roborough* common, and also inclosed the same on the west side, *leaving a drove or way open and uninclosed on the west side of* Axler *common*. That on the south side of *Axler* common there has been immemorially a carriage highway, leading from another highway, (now a turnpike road) and extending along the whole of the south side of *Axler* common; and that when the defendant made the said inclosures he left a sufficient part of *Axler* common, and no more, uninclosed, as and for the said highway on the south side of *Axler* common. That part of *Roborough* common immemorially and at the time of the said inclosure extended to the last-mentioned highway at the east end thereof. That at the time of distraining and impounding the cattle after mentioned, the plaintiff had a right of common for his cattle on *Roborough* common, and lawfully turned them thereon, and they afterwards escaped from thence into the highway on the south side of *Axler* common, and from thence into the said drove or way on the west side of the said inclosure, and were at the time when, &c. in the said drove or way doing damage to the defendant's hedge there, for which

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he diftrained and impounded them. That the plaintiff contended, that inafmuch as the cattle were lawfully turned out upon *Roborough* common, and as there was no gate or fence to prevent them from wandering from thence into the highway on the fouth fide of *Axler* common, and from thence into the faid drove or way in which, &c., the defendant wrongfully diftrained and impounded them. Whereupon the arbitrator awarded that the defendant was not bound to erect nor could legally erect a gate acrofs the highway at the fouth fide of *Axler* common, and that the plaintiff's cattle when diftrained were wrongfully in the place where, &c. doing damage, &c and were lawfully diftrained and impounded by the defendant; to whom the arbitrator awarded damages and cofts for the fame.

A rule nifi having been obtained by *The Attorney-General* and *Dampier* for fetting afide the award, which was now oppofed by *Garrow* and *Bailey*; *the Court* inquired whether the common by reafon of vicinage which exifted before the inclofure would have excufed the wandering of the cattle from the one common to the other by the highway; in other words, whether they were to underftand that the highway led over *Axler* common? And being informed that it did, they faid that there was an end of any queftion; for if the cattle were properly turned in the firft inftance upon their own common which adjoined to the other, and the paffage along the highway over one of the commons was left open to the other, there was nothing to exclude the cattle from wandering into the adjoining common as they had done before the inclofure, or to take away the claim of common by reafon of vicinage; the inclofure and feparation of

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Axler common having been left incomplete by means of the open paſſage left by the highway.

The defendant's counſel urged the fact ſtated by the arbitrator, that there was only ſufficient ſpace left between the incloſures for the highway; and cited the opinion of Lord C. J. *Holt*, in *Bromfield* v. *Kirber* (*a*), that to give common of vicinage the commons muſt be *next* adjoining, i. e. without any intermediate land. They argued further, that the cattle could have no right to common upon the highway itſelf, but their continuing there for that purpoſe would be a nuſance. [But the Court ſaid that the ſame claim of common by reaſon of vicinage continued along the highway uninclosed as before.] It was alſo argued on the ſame ſide, that the incloſure which had been made in this caſe was ſufficient to put an end to the common by vicinage; the whole having been ſeparated by a fence as much as the nature of the thing and the law would allow of; leaving only a free paſſage upon the highway, which even the owner of the ſoil (the defendant) had no right to interrupt by putting up a gate. But the Court ſtill thought that that made no difference: the highway itſelf was part of *Axler* common, and without a complete incloſure and ſeparation the cattle might ſtill ſtray from the one common to the other, without impediment; and therefore the common by vicinage was not excluded.

Rule abſolute.

(*a*) 11 *Mod.* 72.

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The King *against* The Justices of Wilts.

Though a statute giving an appeal to the sessions within 4 months after the cause of complaint, shall arise, direct the justices at the *said* sessions to hear and determine the matter of such appeal, &c.; yet it seems that they have an incidental power of adjourning it to another session, upon lawful cause, such as the absence of a material witness, of the sufficiency of which they are to judge.

But where the appeal was against the sufficiency of an allotment under an inclosure act, and it appeared that the ground was staked out in *March*, when the appellant took possession of and cropped it, though no final award was made of it by the commissioners till long afterwards; yet an appeal lodged at the *October* sessions was held to be out of time; and this, though a small part of the allotment was, with the appellant's consent, exchanged so late as *July*.

BY a local act 49 *Geo.* 3. *c.* 110. for inclosing lands in the parish of *Stockton* in *Wiltshire*, it is provided, that "If any person shall think himself aggrieved by any "thing done in pursuance of the general inclosure act (*a*) "or of this act, &c., he may appeal to any general "quarter sessions of the peace which shall be holden for "the said county of *Wilts within four calendar months* "*next after* the cause of complaint shall have arisen, on "giving notice, &c.: And the justices at the *said* general "quarter sessions are hereby required to hear and determine the matter of every such appeal, and to make "such order, and award such costs, as to them in their "discretion shall seem reasonable."

W. Williams moved on a former day in this term for a mandamus to the defendants to enter continuances and proceed to hear and determine at the next sessions an appeal which had been lodged, by a party grieved by the inclosure, at the last *October* sessions held at *Marlborough*, being within the 4 months, as he stated, after the cause of complaint had arisen. But the justices having, for the more convenient consideration of the case, adjourned the appeal to the then next *January* sessions held at *Devizes*, the justices there assembled considered that the time of appeal was expired, and that they could not take cognizance of it, and therefore refused to proceed upon it.

(*a*) 41 *Geo.* 3. *c.* 109.

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Lord Ellenborough C. J. then said, upon granting a rule to shew cause, that there was a power necessarily incident to the sessions to adjourn the consideration of an appeal properly lodged before them.

Best Serjt., *Barwis*, and *Grant* now shewed cause upon affidavits, stating that the appeal was adjourned from the *October* sessions upon the application of the appellant himself, who was not then ready to enter into it, on account of the absence of a material witness. That the grievance, if any, existed so early as *March* last; the grievance stated by the appellant being that he had not so large an allotment as he ought to have had; and that and other allotments having been made and staked out from the 7th to the 10th of *March*, and notice thereof given to the appellant, who immediately took possession and cropped the land. But that on the 6th of *July* an alteration in the allotment was made by the commissioners, with the express consent of the appellant, whereby an exchange was made of about a quarter of an acre out of 200 acres with another person. They therefore contended that the supposed grievance existing so early as in *March*, the party was out of time to appeal to the *October* sessions: but if that were otherwise, and it were found necessary for the purposes of justice to adjourn the consideration of the appeal, the magistrates might have held an adjourned sessions, as in *Rex* v. *The Inhabitants of Derbyshire* (a), which would have legal relation to the original sessions. But they also contended that the appellant was estopped from appealing at all against the sufficiency of his allotment, after taking possession

(a) 4 *Term Rep.* 488.

of

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of and cropping the land, by which the quality of it was deteriorated.

Lord Ellenborough C. J. I hold, without any doubt, that the Court who are to try the appeal have an incidental authority to adjourn it, when once properly lodged, if it be neceſſary for the advancement or convenience of juſtice; and that the ſeſſions are to judge of the proper occaſion for doing ſo. But the act of the party himſelf in preferring his appeal muſt be within the limited time; the only queſtion therefore is, whether the lodging of the appeal at the *October* ſeſſions were too late? which muſt depend upon the time when the grievance complained of exiſted. As to this point the Court deſired to hear the other ſide.

W. Williams and *Caſberd*, in ſupport of the rule, admitted that the ground of appeal was the inſufficiency of the whole allotment, and not merely the exchange of the quarter of an acre, which was made by conſent. But they denied that the mere ſtaking out of the allotment was the grievance; for after that, it might be altered by the commiſſioners, and, as it appears, it was in fact altered ſo late as *July* in the inſtance mentioned.

Lord Ellenborough C. J. The grievance complained of being the inſufficiency of the whole allotment, which was made and ſtaked out ſo long ago as in *March*, and of which the appellant then had notice, and actually took poſſeſſion of and enjoyed it; the grievance, if any, aroſe in *March*, and therefore he was too late to appeal in *October*. The mere ſtaking out the ground by the commiſſioners might not be a grievance; for that might be done

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behind the party's back and without notice to him; but here he took possession of and cropped the land, which was down land, and could not afterwards be restored to its original state. That makes an end of the question; for he was then clearly out of time in his appeal.

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The KING *against* The Justices of WILTS.

The other Judges concurred.

Rule discharged.

COCK *against* BELL.

Monday, Feb. 11th.

Time refused to be enlarged for the bail to render their principal, on an affidavit that he was a lunatic; it not appearing that he was in such a state as to occasion any immediate peril of life, either to himself or those about him.

THE plaintiff recovered a verdict against the defendant for above 5000*l.* at the sittings after last *Trinity* term; and after a writ of scire facias sued out against the bail in the action, a rule was obtained on their behalf, on a former day, calling on the plaintiff to shew cause why an exoneretur should not be entered on the bail-piece, or further time given to the bail to render the principal, against whom a commission of lunacy was issued in 1809, under which he was found to be and still continued a lunatic. But when the matter was now moved again, the former part of the rule was in the first instance abandoned, upon the intimation of the Court that there could be no foundation for it: and the latter part of the rule was opposed by *the Attorney-General* and *Taddy*, who referred to *Wynn* v. *Petty* (*a*), where the time for rendering the principal was refused to be enlarged; though it was sworn that he could not be removed without endangering his life: the Court saying, that they could not depart from their established practice; and that when one party must

(*a*) 4 *East*, 102.

suffer

1811. suffer by the act of God, they could not interfere. And they said that there was the less reason to do so in this case, because all the circumstances remained the same as when the bail entered into their engagement to pay the debt or render the principal, and they must be bound by that engagement.

Cock *against* Bell.

Topping appeared on the part of the committee, to submit to what the Court should think proper to be done; and only stated, that it would be much more desirable for the sake of the unfortunate person if he could be continued in his present private custody.

Garrow and *Curwood* in support of the rule said, that if the time could not be enlarged, the bail must render the lunatic, however painful the task.

Lord Ellenborough C. J. It is not stated, I observe, in the affidavits, that the defendant is a dangerous lunatic, so that he could not be brought up without immediate danger to his own life or to others. If either his own life were to be put in peril, or the lives of those who are to bring him up, or in whose custody he is to be placed, (or, as *Bayley* J. suggested, if it had been sworn that by continuing him in his present custody a little time longer, he would be likely to recover,) there might be room for consideration. But without any special circumstances to call for the exercise of our discretion, the duty of the Court in this case is clear and precise, and we must discharge the rule.

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CHACE and Others *against* WESTMORE. WESTMORE *against* FORBES.

Monday, Feb. 11th.

Where a cause involving a quest on of law was referred to a barrister under a rule of Court to settle all matters in difference between the parties, and he made his award thereupon; but the question of law did not appear upon the face of the award; the Court, considering that it was the intention of the parties to refer the decision of the merits, as well upon the matter of law as of fact, to the arbitrator, refused to open the award again, upon a suggestion of the arbitrator's mistake in point of law upon the construction of a contract between the parties.

ALL matters of difference between the parties in these causes, (which involved the construction of certain contracts,) were referred to a gentleman at the bar to settle, who made his award thereupon, as well upon the matters of law as of fact. After which it was moved to set aside the award on the ground of a mistake in point of law by the arbitrator: but though the question of law was raised by the pleadings in one of the causes, it did not appear upon the face of the award, but was brought before the Court by affidavit. And now when *Burrough* and *Dampier*, who were to shew cause against the rule, had opened the case to the Court, by stating in what manner the question came before them; Lord *Ellenborough* C. J. and the rest of the Judges intimated great doubt, whether they ought to enter into the merits of the decision. His Lordship observed, that there was a great difference in these cases in considering the object of the reference, and the description of the person to whom the decision was confided by the parties. In ordinary cases, where questions of fact are referred to one who is supposed to be competent to deal with such questions, though not with questions of law; and a question of law happens to arise, on which he decides in a manner which disturbs the whole justice of the case; the Court would I think enter into the enquiry, and correct what was erroneous in the decision. But where a doubtful question of law arises between parties, it often happens, that on that very account they agree to refer

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the matter to the arbitrament of a gentleman of the profession, meaning to refer the decision of the matter of law to him, and to abide by his determination of it.

The Attorney-General and *Gaselee*, who were to have supported the rule, suggested the difficulty that would occur frequently in these cases from leaving the rule to hinge on so uncertain a point as the intention of the parties in agreeing to the reference, which would lead to a previous discussion in every case what their intention was at the time.

Lord ELLENBOROUGH C. J. I fear it is impossible to lay down any general and certain rule upon this subject, in what cases the Court will not suffer an award to be opened: it must be subject to some degree of uncertainty, depending upon the circumstances of each case. But it is enough to say, that in the present case, where the merits in law and in fact were referred to a person competent to decide upon both, we will not open the award, unless it could be shewn to be so notoriously against justice and his duty as an arbitrator, that we could infer misconduct on his part.

The other Judges agreed; and *Le Blanc* J. added, that where the question of law necessarily arises upon the face of the award, there the Court must take notice of it.

Rule discharged.

Doe, Lessee of Lifford, and Elizabeth Mary Anne his Wife, *against* Sparrow and Another.

Tuesday, Feb. 12th.

Under a devise of the residue of a real and personal estate, (subject to the payment of debts and legacies) to the testator's son and daughter, *their heirs and assigns for ever, as tenants in common, and not as joint tenants*; but in case of the death of either, leaving child or children, the share of him or her so dying to go to his or her child or children; or if all such should die before 21, such share to go to the survivor of the son or daughter for ever: but in case his son and daughter should be both dead *at the time of the testator's decease*, without child or children; or leaving child or children, all of them should die under 21 and unmarried, and without child or children; then he gave the *whole* of his real and personal estate to his executors, upon certain trusts for other branches of his family: and then the will proceeded, as to the rest and residue of his estate and effects, *in case of the death of his son and daughter at the time before mentioned, and without child or children, and other the events aforesaid*; then he gave the same to his brother in fee.

Held that the limitation to the children of the deceased son or daughter, or to the survivor of the two, was only a substitution in case of a lapse by the death of the testator's son or daughter *in his lifetime*; so that if both son and daughter survived him, he intended them to take the fee as tenants in common: if one died in his lifetime and left issue, such issue was to take the parent's share; or if there should be no such issue which should attain 21, the survivor of the son and daughter should take the whole: or if both died in his lifetime, and either left issue, such issue was to take: but if both died without issue in his lifetime, then the executors were to take on the trusts mentioned; remainder to his brother in fee.

THIS ejectment was brought to recover a moiety of certain freehold and leasehold property; and at the trial before Lord *Ellenborough* J.C. at the sittings in *Middlesex*, a verdict was taken for the plaintiff, subject to the opinion of the Court on this case:

George Archer being seized in fee of freehold tenements in *St. Dunstan, Stepney*, in *Middlesex*, and being also possessed of other leasehold tenements there, to which he was entitled for terms of years unexpired, on the 25th of *November* 1791, by his will duly executed, after giving a weekly annuity and several pecuniary legacies, devised the same thus: "And as to all the "rest, residue, and remainder of my real and personal "estate, of every nature and kind soever and whereso-"ever, (the copyhold part whereof I have surrendered "to the use of my will,) I give and devise the same, "subject nevertheless to the payment of my debts and "legacies aforesaid, unto my son *George Dorkin Archer*,

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"and my daughter *Elizabeth Mary Ann Archer*, their "*heirs and assigns for ever*; to hold the same, subject "as aforesaid, *as tenants in common*, and not as joint "tenants. *But in case of the death of either* my son or "daughter, *leaving child or children*, then as to the share "of him or her so dying, I give the same to such his or "her child or children; but should there be no child "or children, or, being such, all of them should die "before the age of 21 years, then and in such case I "give the share of him or her so dying, to the survivor "of them my said son or daughter for ever. But *in* "*case* my said son and daughter shall be *both dead at the* "*time of my decease*, without child or children, or leav-"ing child or children, all of them shall die under the "age of 21 years, and unmarried, and without child or "children; then and in that case I give and bequeath "*the whole* of my real and personal estate and effects unto "my executors herein named, and the survivors or sur-"vivor of them, and the heirs, executors, and adminis-"trators of such survivor; upon trust in the first place "to pay my sister *Mary Brown* the sum of 500*l.* for her "own sole and separate use, notwithstanding her cover-"ture, to be paid, &c. as she shall think fit, &c. And "in the event last aforesaid, I give and bequeath unto "the said *William Archer Shaftain*, and unto his mother "in case of his death as aforesaid, the further sum of "200*l.* in addition to the sum of 100*l.* I have before "given to them, and payable at the same time. I also "give to the said *Jane Shirley*, in case of the event "aforesaid, in addition to the said legacy of 20*l.* the "further sum of 80*l.* And as to the rest, residue, "and remainder of my estate and effects as well real as "personal, *in case of the death of my said son and daughter*

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" *at the time before mentioned, and without child or child-*
" *ren, and other the events aforesaid*, I give and bequeath
" the same unto my brother *John Archer*, his heirs and
" assigns for ever." The testator died on the 10th of *October* 1794, leaving his said son and daughter him surviving, who thereupon entered, &c. and afterwards, and before the marriage (which soon after took place) of the testator's said daughter, who is one of the lessors of the plaintiff, with *Joseph Lifford*, the other lessor of the plaintiff, by indentures of lease and release, dated the 1st and 2d of *October* 1795, the testator's said daughter *E. M. A. Archer*, conveyed to her brother *G. D. Archer*, her undivided moiety of part of the freehold premises in fee, and her undivided moiety of part of the leasehold premises to him for the remainder of the terms therein. And *G. D. Archer* being so seised and entitled under the said will and deeds, on the 31st of *December* 1806, by his will duly executed, devised all his freehold and leasehold estates, of which he had power to dispose by will, to the defendants, their heirs, &c. upon trust as therein mentioned; and soon after died, without ever having had any issue, and leaving his said sister *Elizabeth Mary Ann*, one of the lessors of the plaintiff, his heir at law. The defendants are in possession of the whole of the premises comprized in the indentures of lease and release. The question was, whether the plaintiff were entitled to recover that moiety of the said freehold and leasehold premises comprized in the above deeds, which were devised and bequeathed by the testator *G. Archer* to his son *G. D. Archer*. If he were, the verdict was to stand: if not, a verdict was to be entered for the defendants.

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Doe, Lessee of Lifford, against Searrow.

This case was argued in last *Easter* term, and the question made was, whether the limitation over upon the testator's son or daughter dying without child or children, were to be confined to his or her so dying *in the lifetime of the testator*. *Holroyd* for the plaintiff contended in the negative; *Abbott* for the defendant maintained the affirmative. On the part of the plaintiff it was contended, that the limitation over on the death of the son or daughter was not to be confined to the death of either in the testator's lifetime: and *Nowlan* v. *Nelligan*, 1 *Bro. Ch. Rep.* 489. *Lord Douglas* v. *Chalmer*, 2 *Ves. jun.* 501. and *Billings* v. *Sandham*, there mentioned, *ib.* 506. were cited for this purpose. But that the devise to the son and daughter was either a devise to them in fee, defeazible as to the moiety of each by either dying without child or children in the lifetime of the other; in which event it would go over to that other: but if either left issue, such issue would take a fee in the parent's moiety, defeazible also in the event of such issue dying before 21. Or when the testator gives the estate to his son and daughter in fee as tenants in common, but in a particular event he afterwards gives it to the children, if any; that may be taken to control the former words, and make the son and daughter take for life, with a contingent remainder in fee to their children, if any; if none, with a contingent remainder to the survivor: for which *Doe* v. *Collis*, 4 *Term Rep.* 294. *Doe d. Davy* v. *Burnsall*, 6 *Term Rep.* 34. and *Burnsall* v. *Davy*,* 1 *Bos. & Pull.* 215. were cited. Or it might be taken to be an estate tail in the son and daughter, in case either should die in the lifetime of the other without leaving children who should

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come to an age to dispose of the property: but if either should have such children, then to take a fee: and for this he referred to *Anonym.* 1. *And.* 43. *Wild's case*, 6 *Rep.* 16. *King* v. *Melling*, 2 *Lev.* 58. *Doe* v. *Wichelo*, 8 *Term Rep.* 211. *Doe d. Candler* v. *Smith*, 7 *Term Rep.* 531. *Doe* v. *Cooper*, 1 *East*, 229. *Doe d. Applin*, 4 *Term Rep.* 82. On the other side were cited *Trotter* v. *Williams*, *Precedents in Chan.* 78. *Lowfield* v. *Stoneham*, 2 *Stra.* 1261. *Hinckley* v. *Simmons*, 4 *Ves. jun.* 160. *Webster* v. *Hale*, 8 *Ves. jun.* 410. and *Garland* v. *Thomas*, 1 *New Rep.* 82.

The case stood over for consideration till this term; when

Lord ELLENBOROUGH C. J. delivered the judgment of the Court. Before we adopt the construction which is contended for on the part of the defendants, it is material to consider whether the devise to the testator's son and daughter can operate so as to give effect to all the words he has used, without rejecting any thing contained in the devise, or introducing any thing which it does not contain; for there can be no rejection or introduction, if all the words as they stand can operate; but if all the words as they stand cannot operate, the Court must introduce or reject as may best answer what may appear to them to have been the testator's intention (a). The devise sets out with giving all the residue of *the real and personal estate to the son and daughter, their heirs and assigns for ever*, to hold *as tenants in common*, and *not as joint tenants*. The effect of this therefore would have been to have given each immediately a moiety in fee in

(a) *Denn* v. *Bagshaw*, 6 *Term Rep.* 51[c]. and *Doe* v. *Dacre*, 1 *Bos. & Pull.* 259.

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the real estate, and an absolute interest in the personal; and each would have had the power of disposing of his or her moiety either by deed or will, in any manner he or she might have thought fit; and for want of such disposition, the moiety of each would have descended to his or her heirs. This part of the devise, however, is immediately followed by a provision, that *if either son or daughter died leaving issue, such issue should take the parent's share; but if there should be no such issue to attain 21, the survivor of the son and daughter was to have the estate for ever.* If this provision, therefore, were intended to qualify the limitation to the son and daughter, as the plaintiff insists; and not as a substitution in case of lapse; which is the defendants' argument; it annihilates altogether the tenancy in common in fee: it takes away from each all power of disposition to the prejudice of his or her issue; or, if there be no issue, to the prejudice of the survivor: and if there be no issue, instead of giving each a moiety; which is the effect of a tenancy in common; gives the whole to the survivor; which is the effect of a joint tenancy. If this be a qualifying provision, therefore, it qualifies the limitation, by saying, that what was given to them, *their heirs and assigns*, to hold *as tenants in common, and not as joint tenants*, should vest absolutely in neither of them; (and this applies equally to both the personal and real estate;) should not be assignable by either to the prejudice of his or her issue, or to the prejudice of the survivor; should not pass by descent from either, if either left issue; and should be a joint tenancy in fee, and not a tenancy in common. Suppose both to have survived the testator, and then to have died without issue; the survivor, according to the plaintiff's construction, would have taken the whole. Suppose one to have died, leaving issue, which attained

21,

21, and the furvivor to have died without iffue; the iffue of the firft would have taken one moiety, and the furvivor the other: the furvivor, therefore, in that cafe would have taken a moiety in fee, which he might have difpofed of to the prejudice of the iffue of the other. Suppofe one to have died without iffue, and then the furvivor to have died leaving iffue, which attained 21; fuch iffue would have been entitled to the parents' original fhare only, not to the fhare which had accrued by furvivorfhip; but the latter fhare would pafs by defcent to the parent's heir, if the parent had not difpofed of it in his lifetime; or, if he had difpofed of it, would go according to fuch difpofition. In this, therefore, as well as in the preceding cafe, one moiety would be bound, and the other free; one would be fecured to the iffue, and the other might be alienated from them. In none of thefe cafes, however, would the two parents take to them, *their heirs and affigns, as tenants in common.* If there were any tenancy in common in fee, it would be between the furvivor of them, and the iffue of the other; and if neither had iffue, the longer liver would take the whole by furvivorfhip. It is neceffary, therefore, either to reject part of the limitation to the fon and daughter, and their heirs and affigns for ever, to hold as tenants in common, or to introduce fome other words: and the defendant infifts, that the true conftruction is to confider the teftator as contemplating the death of his fon or daughter *in his lifetime;* and to make the limitation to the children of the deceafed or to the furvivor, *as a fubftitution only, in cafe of a lapfe.* This fuppofes the teftator to have had three poffibilities in contemplation; firft, that both fon and daughter fhould furvive him: and then he meant they fhould take the fee as tenants in common. Secondly, that one might die in his life: in which cafe the devife

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devise to such one would be lapsed: and then he meant, that if the one so dying left issue, such issue should take the parent's share; or if there were no such issue to attain 21, the survivor should take the whole. Thirdly, that both might die in his lifetime; in which case the previous devise to both would lapse: and then, if either of them left issue, such issue were to take; but if both died without issue, then the testator's executors were to take, upon certain trusts; with an ultimate limitation to his own brother in fee. The limitations to the executors and to his brother are confined in express terms to the event of the death of his son and daughter *in his lifetime*; and from thence it is inferred, that he was contemplating a death in his lifetime, in the preceding clause, when he spoke of the death of either his son or daughter, leaving issue. It is observable too that that clause, "of "either his son or daughter's dying, leaving issue," is so worded, that though it might be extended to the case of *both* dying leaving issue, it seems expressed as if the testator was contemplating the dying of *one* only; and then it would naturally lead him to the consideration in the succeeding clause, if *both* died *in his lifetime*. It is observable, too, that in this clause, in case of the death of either, though the testator considers the events of their dying with children or without; yet he disposes of the estate in either event: if there are children, to such children; if none, to the survivor: so that he might be contemplating, not death indefinitely, but death in his lifetime. Upon the whole, on this intricate will, we incline to think that the testator was contemplating a death in his lifetime under the clause in question: at least, the lessor of the plaintiff, who is to make out affirmatively that he was contemplating a death *whenever*

it

it might happen, has not sufficiently satisfied us that such was the case: and therefore the verdict ought to be entered for the defendants.

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DOE, Lessee of LITFORD, v. SPARROW.

The KING *against* BIRD.

Tuesday, Feb. 12th.

AN information in nature of a quo warranto was exhibited against the defendant for claiming and usurping the office of a burgess of the town of *Nottingham*. To this the defendant pleaded, first, that *Nottingham* is and from time immemorial hath been an ancient town immemorially incorporated, and now and for 10 years past known by the name of the mayor and burgesses of the town of *Nottingham*, and had immemorially an indefinite number of burgesses. That King *Hen. 6.* by his charter in the 27th year of his reign, confirmed and granted to the then burgesses, that the town should be

1. A prescriptive right in the eldest son of every burgess born in *Nottingham*, and in the younger sons of every burgess born in *Nottingham* and having served a seven years apprenticeship to any trade, and in every person having served a seven years apprenticeship in *Nottingham* to any burgess of *N.*, to be admitted a burgess of the town, on his attaining 21, was holden not to exclude the incidental power arising by implication of law to the corporation at large to secure their perpetual succession by voluntary elections of burgesses ad libitum: and this, though it was averred that *N.* had always been and yet is a populous town, containing numerous resident and trading burgesses; and that by the prescriptive modes of supply by birth and servitude the succession of a sufficient and large number of burgesses is fully secured: for non constat that these sources had *at all times* been sufficient during the existence of the corporation, without occasional supplies of burgesses by election; or even that they were so at the time of the defendant's election; and they could not have operated at all for some years after the creation of the corporation: and therefore no presumption can be made from thence that the crown meant to exclude the incidental power of the corporation to make voluntary elections of burgesses in aid of such prescriptive modes of supply.

2. Whether the power of making such voluntary elections be incidental to the corporation at large, or exist in them by prescription, it is competent for them to delegate it to a select part of themselves. But

3. They cannot delegate such power to any stranger: and the recorder of the town must be taken to be such, if he be not stated to be a burgess.

4. As such select body is the creature of the corporation, its constitution and mode of acting may, it seems, be modelled (with the exception before stated) according to the pleasure of its maker; and where the corporation (consisting primarily of the mayor and burgesses, who were directed by charter to elect aldermen from among themselves,) transferred the right of electing burgesses to a select body, consisting of the mayor and aldermen, of whom the major part must attend; 18 livery or cloathing burgesses, of whom 9 were sufficient to attend; together with the recorder, if a burgess, and if choosing to attend, and six of the burgesses at large, if they choose to attend; but the select body might proceed without either the six burgesses or the recorder, if they did not attend: held that this was a reasonable and valid by-law.

incor-

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incorporated of a mayor and burgesses, who should be one perpetual commonalty corporate, by the name of the mayor and burgesses of the town of *Nottingham*. That the burgesses, their heirs and successors, might from time to time elect from themselves seven aldermen, of whom one should be mayor: and the aldermen elected should continue for life, unless any at his special request made to the residue of the burgesses, or by reason of any notable cause, should be removed from his office by the mayor and burgesses; and that upon any alderman dying, departing, or being removed from his office, the mayor and burgesses might elect one other burgess from amongst themselves into the same office. That this charter was accepted: after which, and before the election of the defendant to be a burgess, to wit, on the 1st of *September* 1606, the then mayor and burgesses duly made a certain reasonable by-law, not now extant in writing, for the avoiding popular confusion and tumult in the election of burgesses; whereby it was ordained that the mayor and aldermen, or the major part of them duly assembled together for that purpose, and eighteen burgesses of the said town, elected, or to be from time to time respectively elected, by the mayor and burgesses from amongst such of the burgesses as should before such election have served the office of sheriff, or of chamberlain of the said town, and called the livery or cloathing burgesses of the said town, to be of the common council of the said town; or any 9 or more of the same 18 burgesses duly assembled together for that purpose; together with the recorder of the said town, if he should in that behalf attend, but otherwise without him; and together with six burgesses of the said town chosen, or to be from time to time respectively chosen, by the mayor and burgesses from amongst

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amongst the burgesses, to be also of the common council of the said town, or such of the said six burgesses as should in that behalf attend, in case the same six burgesses or any of them in that behalf should attend, but otherwise without the same six burgesses; should and might, without the concurrence or assistance of the rest of the burgesses, be able at all future times for ever thereafter to elect and choose such person or persons to be a burgess or burgesses, as to them should from time to time seem fit and convenient. To which said by-law the mayor and burgesses for the time being, from the time of the making thereof hitherto, have consented and conformed themselves, and the same is now in full force unrepealed, &c. That ever since the making of the said by-law, the mayor and aldermen, or the major part of them duly assembled together for that purpose, and the said 18 burgesses elected by the mayor and burgesses from amongst such of the burgesses as had served the office of sheriff or chamberlain of the said town, and called the livery or cloathing burgesses, to be of the common council of the said town, or any nine or more of the same 18 burgesses, duly assembled together for that purpose, together with the recorder of the said town when he in that behalf attended, but otherwise without him, and together with the six burgesses of the said town chosen by the mayor and burgesses from amongst the burgesses of the said town to be of the common council, or such of the said six burgesses as did in that behalf attend, in case the said six burgesses or any of them in that behalf attended, but otherwise without the same six burgesses, have without the concurrence or assistance of the rest of the burgesses been used and accustomed to elect, and still of right ought to elect such person or persons to be

a burgess

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a burgess or burgesses, as from time to time to them seemed fit and convenient. The plea then stated the election of the defendant to the office of burgess under that by-law, on the 2d of *October* 1807, at a meeting duly convened and held at the Guildhall, consisting of the mayor and six other aldermen, ten of the then eighteen livery or cloathing burgesses, together with three of the six burgesses; by which warrant he claimed to use and exercise the office of burgess. The second plea was the same as the first, except that in setting out the by-law of 1606 constituting the select body of electors, it stated the recorder to be one, *if he should be a burgess, and should attend;* but otherwise without him. The third plea was also similar to the first, only stating that the burgesses of the town before the charter of *Hen.* 6. were immemorially incorporated under divers names of incorporation, and that during all that time there have been and now are an indefinite number of burgesses. That from time immemorial until and at the time of the charter of *Hen.* 6. the burgesses of the said town by their various names of incorporation, and from thence the mayor and burgesses of the said town until the making of the by-law of 1606, were from time to time used and accustomed to nominate, elect, and choose, and of right ought, &c. such person or persons to be a burgess or burgesses of the said town as to them should seem meet and convenient. And then the plea set out the by-law of 1606, as stated in the first plea, under which the defendant made claim to the office of burgess by election. The 4th plea was framed in the same manner as the last, stating a prescriptive right in the corporation at large to choose burgesses generally, as used and exercised by them previous to the by-law of 1606: but in setting out that

2d plea.

3d plea.

Prescriptive right in the corporation at large to choose burgesses generally.

4th plea.

that by-law, this laſt plea followed the form of it as ſtated in the ſecond plea, conſtituting the recorder one of the ſelect body only *if he ſhould be a burgeſs*, and *ſhould attend* at the meeting of it.

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Replications to the firſt plea: 1ſt, that the by-law therein ſet forth was not duly made by the then mayor and burgeſſes of the ſaid town, in manner and form as in that plea alleged: on which iſſue was joined. 2dly, That during all the time in that plea mentioned, the town of *Nottingham* hath been and yet is a populous town, and the burgeſſes of the ſaid town reſiding and carrying on trade in the ſaid town of *Nottingham* very numerous; and that during all the time aforeſaid the eldeſt ſon of every burgeſs of the ſaid town born in *Nottingham*, and the younger ſons of any burgeſs of the ſaid town born in *Nottingham*, and having ſerved a ſeven years' apprenticeſhip to any trade, and every perſon who has ſerved a ſeven years' apprenticeſhip in *Nottingham* to any burgeſs of the ſaid town, have upon their attaining their ages of 21 years reſpectively been admitted and been uſed and accuſtomed, and ſtill of right ought to be admitted into the office of a burgeſs of the ſaid town, and to take upon themſelves, uſe and exerciſe ſuch office upon ſuch their admiſſion thereto; whereby the ſucceſſion of a ſufficient and large number of burgeſſes of the ſaid town *is* fully ſecured and provided for. To this there was a general demurrer, and joinder. To the ſecond plea there were the like replications, and the like iſſue on the firſt, and general demurrer to the ſecond replication. To the third plea, the firſt replication took iſſue on the preſcriptive right of election of burgeſſes by the corporation as ſtated in that plea: on which iſſue was joined. The ſecond took iſſue on the due making of the by-law therein ſtated by the then mayor and burgeſſes of the

Replications.

Preſcriptive ſupplies of burgeſſes.

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town in manner and form as there alleged: on which alſo iſſue was joined. And the third replication relied on the ſame preſcriptive, accuſtomed, and ſpecial ſources of election for continuing the ſucceſſion of the corporation, as ſtated in the ſecond replication to the firſt plea: on which there was the like general demurrer. And ſimilar replications were pleaded to the fourth, as to the third plea, mutatis mutandis: on the two firſt of which there were the like iſſues, and the like general demurrer to the laſt.

The objections made to the defendant's election were ſhortly ſtated to be theſe: 1ſt, as to the demurrers to the ſpecial replications to the two firſt pleas, which pleas reſted the validity of the defendant's election on the incidental power of the corporation to make by-laws to regulate their ſucceſſion; that though a corporation has an incidental power to continue itſelf, and to make reaſonable by-laws for that purpoſe, where no proviſion has been made by the crown for the perpetual ſucceſſion; yet where by charter, or by preſcription, which preſuppoſes a charter, ſuch as is ſtated in the replications, the crown has provided ſpecial means for continuing that ſucceſſion, ſuch incidental power, not being neceſſary, does not exiſt. 2dly, As to the demurrers to the ſpecial replications to the third and fourth pleas; which pleas alleged a preſcriptive power of election in the corporation, modified by the by-law; that ſuch a preſcriptive power in the whole corporation cannot be transferred from them, by a by-law, to a ſelect body: but that ſuppoſing it could be ſo transferred by a reaſonable by-law, the by-law ſtated in the defendant's pleas was not a reaſonable one. This laſt objection, as to the reaſonableneſs of the by-law, applied alſo to the two firſt pleas.

Holroyd,

Holroyd, in ſupport of the demurrers, denied that the incidental power of a corporation to continue itſelf and to make by-laws for that purpoſe was taken away or abridged by any mode of election given by charter or preſcription not inconſiſtent with ſuch general incidental power. And he referred to 1 *Rol.Abr.* 513. tit. *Corporation*, G. pl. 5, where it is ſaid that if the king create a corporation of a mayor and 8 aldermen, with a clauſe, that upon the death or amotion of any alderman, it ſhould be lawful for the mayor and the reſt of the aldermen *within* 8 *days* next after ſuch death or amotion to elect another alderman in his place: although there be no election within the 8 days; yet they may elect an alderman at any time afterwards; for they have a power to elect another *as incident* to the corporation created. For anciently corporations had no ſuch clauſe giving them power to elect; *and this affirmative power does not toll the implied power incident to the corporation.* This was reſolved by this Court in the caſe of *The Corporation of Launceſton*, in *E.* 8 *Car.* 1.; and a writ was granted accordingly to elect another alderman. That caſe was referred to by Lord *Holt*, in *Phillips* v. *Bury* (*a*), though he only there applied the principle of it to caſes where no proviſion was made in the charter how the ſucceſſion ſhould continue: but it muſt equally apply to all caſes where there is no inconſiſtent or negative proviſion. The charter looks to a perpetuity of ſucceſſion, as one of the deſigns and ends of the incorporation, and the law incidentally gives to the corporation every power neceſſary for carrying into effect and inſuring the accompliſhment of that purpoſe. Such a power therefore can only be taken away, if at all, by

(*a*) Reported in 2 *Term Rep.* 352.

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by exprefs words or neceffary implication; but the intent of the crown to fuperfede it cannot be inferred from its having given an inchoate right to others, not of the corporation, to come in and claim to be admitted; for that would be to make the corporate fucceffion depend, not upon the corporation itfelf, but upon the will of thofe other perfons. The incidental power does not derogate from the claims of thofe perfons, nor are their claims incompatible with the power. It muft in its nature be uncertain too whether a fufficient number of apprentices can be fupplied from the trades in the town to continue the fucceffion: whereas the means of perpetuating themfelves ought to be certain in the corporation. The fubftance of the provifion made for continuing this corporation is that though the law has given it a power of fupplying itfelf with members by election, yet it fhall not refufe a certain defcription of perfons claiming and tendering themfelves to be admitted. No prejudice can enfue to a corporation from the exiftence of fuch an incidental power; for it muft be annexed to the body at large: and though they may by a by-law delegate it to a felect body; yet it can only be exercifed by fuch felect body with the continuing affent of the body at large, who may at any time abrogate the by-law and refume the exercife of the power themfelves. At any rate this objection to the incidental power does not apply to the two laft pleas, which allege a prefcriptive power in the corporation to elect. But next it is objected, (which applies to all the pleas,) that neither the incidental power, if it exift, nor the prefcriptive power, can be transferred from the whole to a felect body. But it has been long fettled that the power of election to corporate offices, even where given by the exprefs words of a charter to a

general

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general body, may be by them delegated to a part of themselves, though not to others. This is laid down generally in the case of corporations, 4 *Rep.* 77. *b.* 4 *Inst.* 48. *Jenk. Cent.* 273., and in many subsequent authorities: and no distinction is taken between the election of burgesses at large and that of corporate officers. Lastly, as to the reasonableness of the by-law; it in effect assumes that the right of election was in the body at large, and restrains it to a certain number of them representing the integral parts of the whole body, (supposing the recorder to be a burgess, as stated in two of the pleas;) namely, the mayor and aldermen, or the major part of them duly assembled for the purpose, 18 burgesses to be chosen by the mayor and burgesses out of the livery or cloathing burgesses, who have served certain corporate offices, to be of the common council, or any nine or more of them duly assembled for the purpose, together with the recorder, if he attends, and also six others chosen by the mayor and burgesses from the burgesses at large, or such of them as choose to attend. If any by-law, therefore, narrowing the number of electors can be reasonable, this seems to be of that description. The select body so constituted must be duly assembled for the purpose; which supposes that they are summoned. If the by-law had given the power of election to the major part of the mayor and aldermen and nine of the cloathing burgesses, it would still have been good, though none of the other burgesses had been permitted to come in; and the major part of those so assembled would have bound the corporation: then admitting six of the other burgesses to come in, if they choose to attend, cannot make the by-law unreasonable. If the by-law had excluded any integral part of the cor-

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poration from the elective body, which before had a right to join in the election, there would be great weight in the objection: but here the right of election was antecedently in the mayor and burgesses at large, and therefore the aldermen and common councilmen had only a right to vote as *burgesses*. The objection as to the recorder's being admitted into the select body, though he be not a burgess, is founded upon the case of *The King* v. *Spencer* (a), where the principle was laid down, that a corporation cannot delegate the elective power to any description of persons who had it not before. But there the qualification of having served *parish* offices was one which had no concern at all with the corporation; whereas here, the recorder is connected with them: he is to give them legal advice, and must be appointed under the charter or by the corporation. [It was observed, e contrà, that it did not appear that there was any such officer.] If there be no such officer, the appointment of him will not hurt the by-law. [Lord *Ellenborough* C. J. It does not appear that he is a member of the body corporate, or that he is appointed by them: he may be appointed by others, though his office be to do them service. *Bayley* J. He may be appointed by the mayor alone, and not by the corporation: and if not a member of the corporation, he could have had no previous right of voting in the election.] At any rate the objection does not apply to the second and fourth pleas.

Dampier, contrà, admitted that where a charter says nothing as to the mode of continuing the succession of a corporation, the power of election is incident to it, as Lord *Holt* says of *necessity*, [though that was doubted in

(a) 3 *Burr.* 1827.

12 *Rep.*

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12 *Rep.* 120., and the *Launceston* case (*b*) cited, does not prove it:] for the law gives it in that case to avoid the absurdity of a grant to the immediate members of the corporation, and *their successors*, without providing the means of continuing the succession. But where there is no such necessity, as where the crown by its charter, or where prescription, which pre-supposes a charter, has provided for the succession and limited the objects of election, no such incidental power can attach, without altering the constitution given them by the crown, and loosening the corporation from the restraint imposed upon them by it in the objects of election. The effect of this would be to make a very important alteration in the constitution given to them, and which they have accepted. The *Launceston* case cited from 1 *Rol. Abr.* 513. does not prove the position contended for. The power of election was given to the aldermen generally; and the electing within eight days was merely directory. But at any rate the incidental power in the corporation at large to elect, being founded in necessity, does not attach here, where enough appears on the record to shew that there is no danger of a failure of succession for want of a sufficient local population in the place, answering to the description of persons having inchoate rights to their freedom. When any such failure is likely to take place, it will be time enough to consider whether the incidental power arises to the corporation at large. But this is an assumption of a power in the first instance which the crown has not given. The king has said that they shall be a corporation formed of members having a certain relation to the town; and it meant to hold out that en-

(*a*) 1 *Rol. Abr.* 513. *pl.* 5.

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couragement to the freemen of the town to marry and ſettle, and carry on their trades there. It was a proviſion to encourage the population of the town. But the corporation by the by-law take upon them to add a foreign body of their own election in derogation of the influence and intereſt of the local inhabitants, whom the crown meant to favour; inaſmuch as all corporate rights are leſs valuable in proportion as they become more extended. If a by-law cannot ſuperadd (*a*) a qualification to an elector, why ſhould it take away qualifications from the elegible. The crown then having provided the ſpecial ſources ſtated, out of which the ſucceſſion is to be continued, and the replication ſtating that *Nottingham* hath been and yet is a *populous* town, and the burgeſſes reſiding and carrying on trade there *very numerous*, and that by the means there ſtated *the ſucceſſion of a ſufficient and large number of burgeſſes of the town is fully ſecured and provided for*; the defendant muſt contend that the general power of election, which if a charter be ſilent is incident to the corporation, cannot be taken away by a ſpecial proviſion. [Lord *Ellenborough* C. J. The crown has ſaid, that the corporation ſhall have perpetual ſucceſſion, and that ſuch and ſuch a deſcription of perſons ſhall be ſtocks, out of which the ſucceſſion ſhall be ſupplied: but would it be bad in a charter if the crown were to exclude in expreſs terms the incidental power now contended for?] Such a clauſe would certainly not be void where the crown has provided other adequate means of ſucceſſion. The power of making by-laws is alſo incidental to the whole body corporate; and yet that may be reſtrained. In *Rex* v. *Head* (*b*), Lord *Mansfield* ſaid,

(*a*) Vide *Rex v. Tappenden*, 3 *Eaſt*, 186.

(*b*) 4 *Burr.* 2521.

" the

"the body at large had no power to make by-laws, because that power is by the charter given to the common-council." So here, the body at large before the by-law had no power to elect whom they pleased, because by prescription the freedom of the borough was limited to certain descriptions of persons. Again, in *Child* v. *The Hudson's Bay Company* (*a*), Lord *Macclesfield* says, "a corporation has an implied power of making by-laws; but where the charter gives the company a power to make by-laws, they can only make them in such cases as they are enabled to do by the charter; for such power given by the charter implies a negative that they shall not make by-laws in any other cases." It is said, however, that the persons, out of whom the crown has provided for the succession to be made, cannot be compelled to come in and become corporators; but neither can the assent of those be insured who are elected by the body at large under the incidental power. These however are extreme cases which cannot be provided for. Then as to the demurrers to the replications to the two last pleas; supposing the corporation to have a prescriptive power of electing whom they please to be burgesses, yet it cannot be transferred by a by-law. Lord *Kenyon* in *The King* v. *Holland* (*b*) observed, that he was not prepared to say, that such a by-law, if it had existed, would have transferred the power from the body at large to a select part of it. [Lord *Ellenborough* C. J. observed that no authority was referred to by Lord *Kenyon* for the doubt expressed by him.] The case of corporations (*c*) is so well known, that when his Lordship threw out that doubt, he must have had that case in his mind, and could not have considered the question as con-

(*a*) 2 *P. Wms.* 209. (*b*) 2 *East*, 70-4. (*c*) 4 *Rep.* 77. *b.* 78. *a.*

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cluded by it. On that authority the defendant now refts; but it is very diftinguifhable from the prefent. The right of reftraining the number of electors by a bylaw there recognized, in order to avoid popular confufion and tumult, feems to have been confined to elections of the principal annual officers of corporations, as mayors, bailiffs, &c. and was not meant to be extended to the general body of the corporators. It pre-fuppofes a neceffity of annually recurring elections, and is grounded on the prevention of tumults, which the continual recurrence of fuch elections would caufe in the towns: and that this is not to be applied to cafes where the privileges of freemen are to be invaded in elections of burgeffes to ferve in parliament appears alfo from 4 *Inft.* 48, 49. It feems too a ftrange method of obviating popular tumults and confufion in elections, to let into the corporation a new body of electors in addition to the prefcriptive claimants: and if the prefcriptive fupplies failed, there would be as little pretence of that fort for transferring the elective franchife from the general to a felect body. He referred generally to the principle of the cafe of *The King* v. *Breton* (*a*). As to the reafonablenefs of the by-law; where the power is given by it to a felect body to elect whom they pleafe, without reference to the prefcriptive qualifications, it is the more neceffary that the felect body fhould fairly reprefent the body at large, and more particularly the freemen, the mafs of whom are excluded from exercifing the elective rights given to them by the general law as well as by the local prefcription: and the defendant, who relies on the bylaw, fhould fet forth thofe facts from whence the Court

(*a*) 4 *Burr.* 2260.

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may judge of the reasonableness of it. Now as the 18 preponderate in this body over the two other bodies of 7 and 6, it ought to have appeared whom they represent; but the nature of the offices they must have passed through as a qualification is not shewn. The burgesses at large are represented only by six, and even these few are not a necessary part to make an elective assembly: not only they need not attend, but it does not appear necessary that they should be summoned. If the 18 represent the livery or select body, the representation is most unequal, being 25 to 6. [Lord *Ellenborough* C. J. I cannot see what objection there would be on the ground of unreasonableness to a by-law, restraining the power of election to such burgesses out of the whole body as had been appointed by their fellow burgesses to certain corporate offices.] It is further to be considered, whether a by-law can reasonably create an elective assembly constituted and held under different rules from those which regularly govern corporate meetings: for to say nothing of the absence of the recorder ad libitum, who is an integral part; even a majority of the 18 is not required, but an attendance of 9 of them is sufficient; and none of the 6 who represent the burgesses need attend: so that out of the whole number of 32, consisting of three integral parts of 18, 7, and 6, besides the recorder, 13 only, consisting of 9 of the 18 and 4 of the 7, are sufficient to form an elective assembly. This is an anomaly in the constitution of elective bodies. [*Le Blanc* J. The six are made a component part by the by-law only: they are no integral part of the corporation: then why may not the by-law regulate their attendance?] It does not follow that a regulation which would be good in a charter, or by

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prescription (*a*), is good in a by-law. The king by his charter may make any provisions which are not contrary to law; and the persons to whom the charter is offered are free to accept or reject it: there can be no question about reasonableness: but a by-law which is not reasonable in itself is therefore void; and the majority who make it affect to bind the minority against their will and in derogation of their former rights. For instance, the clause in King *James* the Second's charters, enabling the crown without cause arbitrarily to remove all the governing part of the corporation, is so unreasonable, that its legality has often been attacked on that ground; but the Court has always said, as in *Rex* v. *Amery* (*b*), that if the corporation would accept such a charter, they must abide by it. And yet a by-law to that effect would clearly be bad. [Lord *Ellenborough* C. J. Supposing this by-law were to be devested of the superfluous body, and to be considered as if it stated in terms that such and such persons, making the 13 who have been alluded to in the argument, should elect, what objection would there be to it?] It is not reasonable that 9 only, out of an integral part of 18, should constitute an elective assembly to bind the rest, not being a majority of the whole number. [Lord *Ellenborough* C. J. It is a body of the corporation's own creation: and if they have the power to appoint the lesser body to elect, why may they not enable it to act by certain members assembled, though they may not be a majority of the entire number?] Upon the whole this cannot be said to be a reasonable by-law, which constitutes an aggregate body,

(*a*) Vide *Rex* v. *Hoyte*, 6 *Term Rep.* 430. (*b*) 2 *Term Rep.* 568.

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without ſetting out the qualifications of much the larger part of it; which breaks through the general rule of all corporate meetings, that every integral part of a body ſhall attend by themſelves or their majority, by making the preſence of 9 out of an integral body of 18 ſufficient; which diſpenſes with the attendance of the recorder altogether, who if he be a member of the corporation is an integral part; if a ſtranger, can have no corporate function conferred upon him; which diſpenſes entirely with the attendance of another integral body of ſix; and this, to the prejudice of thoſe whom the ſix repreſent, and from whom all the authority is ſuppoſed to be derived; and altogether making a meeting of 13 ſufficient to repreſent a body of 31, excluſive of the recorder. If any of the objections taken to the defendant's title prevail, the two firſt pleas are diſpoſed of: if either of the two laſt heads of objection be good, all the pleas are bad.

Holroyd, in reply, denied that the incidental power is limited by the neceſſity out of which it was ſaid to ariſe; for the reaſon of it is to ſecure the perpetual ſucceſſion; and where that is not ſecure by the expreſs power given by the crown, the law gives the incidental power as coexiſtent with the expreſs power, to be exerciſed at the pleaſure of the corporation, even previous to the exiſtence in fact of any neceſſity. [Lord *Ellenborough* C. J. You muſt then contend, that the incidental power exiſts in all caſes, becauſe by poſſibility and accidents it may be neceſſary; for no proviſion can be made which would guard againſt every poſſibility; all the exiſting electors might die before a new election could be made.] In no caſe can the power be limited by a ſtrict neceſſity even

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where some necessity is admitted to exist; for the corporation might elect as many as they pleased upon the emergency. But here, without the incidental power, there would be a defective security for the perpetual succession, inasmuch as it is made to depend upon the will of others, and the corporation have no means of compelling the prescriptive claimants to come in and be admitted. Where a general power of making by-laws is given by charter to a select part of a corporation, that shews that the crown meant such power to be exercised by them in exclusion of the body at large; as in the case of the *Hudson's Bay Company*, and other cases. It is true that even with the incidental power, the corporation cannot compel those whom they elect to come in: but the law can do no more than enable the corporation, as far as in them lies, to continue the succession. *The King* v. *Breton* (*a*) does not apply; for that was the case of a by-law giving any stranger a right to be elected on payment of a certain sum of money. [Lord *Ellenborough* C. J. That was converting a power of election given to the corporation into a power of sale.] The power of election is given to the attending body in this case if amounting to a certain number: it is not given to the minority of the body so attending to make the election.

Lord Ellenborough C. J. With respect to those pleas, stating the recorder to be one of the select body, without shewing him to be a member of the corporation, they may be disposed of at once. He may be a stranger to the corporation, and therefore there could be no delegation of the elective power to him. But there is one point on which I should wish to have further considera-

(*a*) 4 *Burr.* 2260.

tion

tion before I deliver my final opinion upon it; that is, how far any incidental power of electing burgesses arises ex necessitate in this case, as it must do, where a prescription has provided certain modes for supplying members to the corporation. For if the modes of supply appointed by the crown be in fair construction competent to keep the body alive in the manner intended, I should not be inclined voluntarily to adopt another mode of effectuating that purpose. As to the validity, however, of the by-law, on general grounds, it appears to me to be not only a good but a very good by-law. It is calculated to exclude popular confusion in elections; a principle which was long ago established in the case of corporations; and I see no reason why it should not have been as much applicable to the election of burgesses at large as of the higher orders of the corporations, in the time of Lord *Coke*. But the mode of constituting the select body is objected to. It is to consist, in the first place, of the mayor and aldermen, of whom the major part must be present: and it is to be observed, that the corporation, consisting of the mayor and burgesses, the aldermen are selected only as part of the burgesses. Next there are to be 18 cloathing burgesses to be elected by the mayor and burgesses from amongst such of the burgesses as had served certain corporate offices: of these, nine must be present; which, it is said, is not a majority: but it was as competent to the framers of the by-law to select nine as any other number for the purpose. They are all creatures of the by-law. In addition to these, six burgesses of the body at large may be present, if they please; and so may the recorder, if he be a burgess; but the select body may proceed without any of the six burgesses or the recorder, if they do not attend: and the giving them the privilege of attending if they choose

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cannot hurt. There must be at least thirteen attend, and these are persons who have been before selected out of the burgesses at large by their fellow burgesses as worthy to fill the higher offices of the corporation. The body, therefore, appears to be constituted of a very select description of the burgesses, elected by their fellow burgesses to the principal places of trust in the corporation (*a*). The Court having no doubt upon these points, it will not be necessary to recur to them again: the only question we shall reserve for further consideration is upon the incidental power of election in this case.

The case stood over, and his lordship now delivered the judgment of the Court upon the point reserved.

This was a quo warranto information against the defendant to shew by what authority he claimed to be a burgess of the town of *Nottingham*. The defendant pleaded four pleas: the first stated, that the burgesses of the town were a body politic by prescription, and that the number of burgesses was indefinite. That by charter of the 27th of *Hen. 6.* they were incorporated by the name of the mayor and burgesses, with power to elect seven aldermen, of whom one was to be mayor. That on the 1st of *Sept.* 1606 they made a by-law, that the mayor and aldermen, or the major part of them, the clothing or livery burgesses, consisting of 18, or any nine or more of them, with the recorder, if he attended, but not otherwise, and six other burgesses, if they attended, but not otherwise, should from thenceforth have the election of burgesses without the interference of the rest of the body. That this has been the constant usage ever since: and

(*a*) Vide *Rex* v. *Ashwell*, 12 *East*, 22. as to the by-law made by this corporation restraining the right of election of aldermen.

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that the defendant was elected in conformity thereto. The second plea states it as part of the by-law, that the recorder, if he concur in the election, must be *a burgess*. And the third and fourth pleas state, that from time immemorial until the making of the by-law it was the custom of the town to elect burgesses. In other respects the second, third, and fourth pleas agree with the first. Upon these pleas the prosecutor has taken issues upon the existence of the by-law, and upon the custom stated in the third and fourth pleas: and he has also pleaded to each plea this special replication, That, during all the time mentioned in the pleas, the eldest son of every burgess born in *Nottingham*; the younger sons of every burgess born in *Nottingham* and having served a seven years apprenticeship to any trade; and every person having served a seven years apprenticeship in *Nottingham* to any burgess of *Nottingham*, has been entitled to be admitted a burgess of the said town on his attaining 21; whereby the succession of a sufficient and large number of burgesses is fully secured and provided for. To each of the special replications the defendant has demurred generally, and the prosecutor has joined in demurrer.

Upon the argument it was insisted upon by the prosecutor, as a special objection to the first and third pleas, that the by-law stated in them could not be supported, inasmuch as it purported to give a right to the recorder to concur in elections, though he were not an alderman or burgess; and that though a by-law might narrow the number of electors, it could not give a voice in the election to any person to whom a voice was not given by the constitution of the borough. The Court immediately after the argument gave their opinion that this was a valid objection; and upon the first and third pleas, therefore,

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to which the objection applies, there must be judgment against the defendant. The Court also gave their opinion immediately after the argument, that the by-law as stated in the second and fourth pleas was a valid by-law; and as the supposed invalidity of that by-law was the only objection to the defendant's having judgment upon the fourth plea, the defendant must of course have judgment for him upon that plea.

Upon the second plea the question arises, upon which the Court took time to consider; and that question is this, Whether, inasmuch as in the cases stated in the special replication there are persons entitled to be burgesses without election, and inasmuch as no usage to make burgesses by election is stated, (except for a period of too modern a date to influence the decision of the Court, viz. since the making of the by-law stated in that plea) the corporation has the right to make burgesses by that mode, that is, of election? According to 1 *Roll's Abr.* 513. G. by the making of a corporation all necessary incidents are included, amongst which those of making by-laws, pleading and being impleaded, and the means of perpetual continuance in succession, are there mentioned: and it is observed in *pl.* 5., after noticing the power to elect as incident to the corporation, as follows; "for ancient corporations have not any such clause giving them power "to elect." Indeed it was admitted in this case upon the argument, that where no mode is provided for continuing the succession, a corporation has a right *of necessity* to make burgesses by election; but it was urged that if the right by election were not expressly given, and there were any other mode of providing burgesses, the corporation could not proceed by way of election. This position however seems to us to be in its principle too narrow.

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Where there is a provision of such a nature as is calculated *at all times* to procure a sufficient supply of burgesses, without ever proceeding by way of voluntary election, it may furnish a ground for presuming that voluntary elections were meant to be excluded: but where there is no provision affording a supply of burgesses in this extent, we think the corporation has the right of proceeding by election; and we think we are not warranted in stating, that the provision set forth in the special replication is of this requisite extent. This provision for a supply by the sources of birth and servitude is certainly not incompatible with the existence of a power of election: for though these modes of supply may render a frequent recurrence to election less necessary, the supplies from all these sources are not likely so to overload the corporation as to incumber its operations by a destructive or very inconvenient redundancy of its members: and, without occasional supplies by election, the other sources by birth and servitude might prove insufficient. The replication does not state as a fact that these sources by birth and servitude were competent to produce a sufficient supply *at all times*, or that they had, *during the existence of the corporation*, always produced such sufficient supply, or even that they *did so at the time when the defendant was elected*: but it merely states, by way of inference from the alleged fact of the existence of a right in the several descriptions of persons specified in the replication, that the succession of a sufficient and large number of burgesses *is* (that is, *now is*, in the present state of the borough) fully secured and provided for: and we cannot state, as a necessary inference at law from the existence of a right in these several descriptions of persons, that the sources pointed out are calculated to produce *at all times* a suffi-

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cient supply. There is no mode stated of compelling any of the persons of the descriptions mentioned in the replication to come in and be admitted: so that if the corporation could not proceed by way of voluntary election, it might be in the power of those persons to bring about a dissolution of the corporation, and the continuance of the succession would depend upon *them*, and not upon the corporation. And though there be no mode of compelling the persons who may be the objects of voluntary election to take upon themselves the freedom, the corporation, where they have power of electing, can pass from object to object indefinitely till they find persons who are willing to accept the office. Besides, supposing the rights by birth and servitude to be as ancient as the creation of the corporation itself, still one of the sources of supply, namely, that by apprenticeship to burgesses, must have been in abeyance for at least seven years after the creation of the corporation; and (if, to constitute the right by birth, the father must have been a burgess at the time of the birth,) the right by birth must have been in abeyance for at least 21 years after the creation of the corporation. We are therefore of opinion, that the general incidental right by election is not in this instance taken away by construction of law; and consequently that upon the second plea, as well as upon the fourth, there must be judgment for the defendant.

SHARP *against* CLARK, in Error.

Tuesday, Feb. 12th.

Where the proceedings are by original, the plaintiff in error cannot be ruled to appear before the quarto die post of the return day of the alias writ of scire facias quare executionem non, &c. where nihil had been returned.

A Rule was obtained, on the part of the defendant, calling on the plaintiff to shew cause why the rule upon the scire facias quare executionem non, &c., the writ of testatum fieri facias issued in this cause, and all proceedings had thereon, should not be set aside for irregularity, with costs, and further proceedings stayed in the mean time.

Judgment having been obtained by *Clark* in an action by original in C. B. against *Sharp*, and a writ of error having been allowed thereon returnable in last *Michaelmas* term, and served on his attorney; the first writ of scire facias quare executionem non, &c. was issued on the 16th of *January* last, returnable in 8 days of *St. Hilary*, and then an alias writ of the same kind was issued and tested on the 23d of *January*, returnable in 15 days of *St. Hilary* (the 27th); upon both which nihil was returned. *The rule to appear on these writs was given on the 28th*, and on the 5th of *February* instant, the defendant in error issued a testatum fieri facias against the plaintiff in error indorsed to levy the debt, &c. under which the sheriff had levied: which writ of execution was issued and executed on the alleged ground that the plaintiff in error had not assigned error. And the question was, whether the rule to appear had been given prematurely before the quarto die post of the return day of the alias writ of scire facias; in which case the plaintiff in error was in time to assign errors, and the testatum fieri facias issued too soon.

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Park was heard against the rule, and *Marryat* in support of it: the former admitted that the practice as contended for e contrà, was stated in *Impey's Pract.* (a); but that no authority was cited for it: and that here no proceeding was had till the 5th of *February*, which was after the quarto die post. The latter took the distinction between proceedings by original, and by bill: that in the former case, no proceeding can be had until the quarto die post, which by the practice is considered as the return day of the writ; before which time he could not be ruled to appear. But when the action is by bill, the party may proceed upon the return day of the writ.

And *The Court* agreed, that in this case, where the proceedings were by original, the plaintiff in error had till the quarto die post of the return day of the alias scire facias, &c. before he could be ruled to appear; which by the constant practice of the Court was an excrescence upon the time given for the return of the writ: and that the defendant in error could not give a monitory rule to appear before that time: and therefore for want of a rule to appear given after the established time for appearance, the quarto die post, the proceedings complained of were irregular.

Rule absolute.

(a) Vide 7th edit 529 and 795.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fifty-first Year of the Reign of GEORGE III.

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REGULA GENERALIS.

IT IS ORDERED, That in every notice of trial hereafter to be given for the Sittings after any term, to be holden at the *Guildhall* of the city of *London*, it shall be specified whether the cause is intended to be tried at the first day of such Sittings, or at the adjournment-day; and that in every case in which such notice shall specify that the cause is to be tried at the adjournment-day, it shall be sufficient to give such notice eight days before the first day of the Sittings after term, if the defendant or defendants reside above forty miles from the said city of *London*; and four days before the said first day, if the defendant or defendants reside within that distance.

A notice of trial for the sittings after term in *London* must specify whether the cause be intended to be tried at the first day of such sittings, or at the adjournment-day: and in the latter case, it is sufficient to give such notice eight days before the first day of the sittings after term, if the defendant reside above 40 miles from *London*; and four days if he reside within that distance.

By the COURT.

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Thursday, May 2d.

JARMAN and Others *against* COAPE.

British goods on board a neutral ship, being insured from *London* to any ports or places of discharge on the continent, &c. with liberty to carry simulated papers, &c. *free of capture or seizure in her port or ports of discharge*; and the ship having received instructions to proceed to the river *Jahde*, with a supercargo, who, when arrived there, was to go to *Varel*, which lies 30 miles up the river, and there give notice to a correspondent of the ship's arrival, and receive directions where the goods might most safely be landed; *Varel* and the whole adjacent country being then occupied by the enemy; held that a seizure by the enemy in boats from the shore while the ship was lying on and off in the middle of the river, 15 miles up, where it is two miles wide, waiting for directions from the supercargo, who had gone up to *Varel* to get instructions where to land the cargo, was a seizure in a *port of discharge* within the exemption in the policy: for the intention of the contracting parties was plainly to exempt the underwriters from land-risks in any such place of discharge, leaving them subject only to sea-risks; and therefore the word *port* must be taken in its general and most extensive sense, as contradistinguished from *the high seas*, with reference to the subject-matter; though the place where the seizure was made was not ordinarily denominated a *port*, nor were goods used to be landed there in the accustomed course of commerce.

THIS was an action on a policy of insurance on goods on board a neutral ship, the *Jonge Harm*, "at and from *London* to any port or ports, place or places, of discharge, all or any, on the continent, including also *Norden* and *Nordeney*, both or either; with liberty to touch at *Heligoland*, and during any time she may stay there, including the risk of lighters from shore to shore; with leave to return to *Heligoland*, if she did not discharge as above; with leave to carry simulated papers and *British* licence: *free of capture and seizure in her port or ports of discharge*." In fact, the ship was captured in December 1809 by the *French* in the river *Jahde*; the adjacent country being then occupied by and under the dominion of a *French* force stationed there for the purpose of preventing any commercial intercourse with *Great Britain*; and the only question was, whether at the time of such capture she were in any *port* of her discharge, within the meaning of the warranty? As to which, the facts appeared to be these. The ship sailed on the adventure insured from *London* on the 31st of *October*, and arrived at *Heligoland* on the 9th of *December* 1809, where the consignee mentioned in the bill of lading sent an agent on board on the 21st, with instructions to proceed in the ship to the river *Jahde*, and, when arrived there, to go to

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Varel, which lies about 30 miles up the river, and there give notice to the plaintiff's correspondents of her arrival, and receive their directions where the goods might be landed with the greatest safety. The ship accordingly arrived in the *Jahde* on the 23d of *December*, and first dropped anchor about 5 miles up, where the agent landed, and soon after availed himself of an opportunity which offered of going up to *Varel* in another vessel having a *French* licence. The captain of the *Jonge Harm* then weighed and stood about 10 miles higher up the river, and while lying on and off there, waiting for intelligence, and instructions where to land the cargo, the ship was on the 25th of *December* captured in a fog by some boats coming from the shore with *French* custom-house officers belonging to *Varel*, and carried up to that place. The harbour of *Varel*, which is no port of entry, lies about 2 miles below the town. The lower part of the *Jahde* is of very wide extent, opening to the great rivers *Elbe* and *Weser*, and contains several ports and places for landing goods, none of which were then in contemplation of these parties. The lower part of the river is full 3 miles wide within the banks; and the captain swore at the trial that the place where he was captured was of the width of 2 *English* miles or more; and though he had traded up the river for some time before, he had never seen a vessel discharge her cargo in that part of the river, without a certain point of land which was mentioned. Under these circumstances the case went to a jury of merchants at *Guildhall*, who with the advice of Lord *Ellenborough* C. J. that there was sufficient evidence of a seizure in the ship's intended port of discharge, within the meaning of the contract between these parties, found a verdict for the defendant.

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JARMAN *against* CRAPE.

The Attorney-General now moved for a new trial, because it did not appear by the evidence that the ship had reached her *place*, much less her *port* of discharge, when she was seized: on the contrary it appeared that she was then waiting for instructions whither to proceed, in order to discharge her cargo. If the agent had found it impracticable to land her cargo with safety at any place in that part of the river, he might have ordered her to return and seek some other place for discharging her cargo. It was not suggested at the trial that the vessel was to unload in the place where she was seized; being in the middle of the river, which was there of great width: and in *Brown* v. *Tierney* (*a*), a ship warranted free of capture or seizure in port or ports was held not to be within the warranty while lying in an open road outside the harbour of *Pillaw*, to which place she was bound. [Lord *Ellenborough* C. J. The parties could not contemplate beforehand any particular place of discharge: they were to land the cargo within the river *Jahde* wherever they could elude the vigilance of the *French* douaniers.] There is no instance of any vessel unloading in that river without the point of land spoken of at the trial, below which this vessel then was. [Lord *Ellenborough* C. J. The policy contemplates that the ship might discharge at places which were not regular ports of discharge: the language of it is adapted to the present state of the commercial world, which never before exhibited such an extent of the *French* power from one end of the continent to the other.] He then said that he had an affidavit, that at the time of the seizure the captain was standing on and off till he received instructions from the agent where he was to proceed in order to land the cargo.

(*a*) 1 *Taunt.* 517.

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Lord ELLENBOROUGH C. J. The meaning of the policy is not capable of being misunderstood. The ship sailed upon an adventurous expedition, without any fixed port of discharge in contemplation in the first instance: this was afterwards to be elected as the assured should be advised: but the underwriters meant to protect themselves from loss by capture or seizure in the elected port of discharge wherever that might be. It was afterwards determined to proceed up the river *Jahde* for the purpose of landing the cargo there, as soon as advice could be received of the safest place of landing: and after the ship had proceeded about 15 miles up, the supercargo went on shore in order to negotiate with his correspondents on the best place for landing the cargo. The negotiation however failed, probably from the terror of committing the *French* officer, whom it was necessary to gain, being greater than the ordinary means taken to avert it, and the ship was seized. Now this was one of the very perils which the underwriters meant to exempt themselves from, namely, such as might arise from unsuccessful efforts to effect a landing in the elected port of discharge. The ship had gotten within what, in a general sense and for the purpose which the contracting parties had in view, was to be considered as her port of discharge, and there she was captured by a force coming immediately from the land. But at any rate this was a question for the consideration of the jury, who were all persons of intelligence upon such subjects, and some of them had maps of their own of the river *Jahde*. They had as good means therefore of deciding the question rightly as any other jury would be likely to have. I thought indeed, at the trial, and so did the jury, that taking the word *port* in a large sense to meet the intention of the parties, this vessel was within her elected port of dis-

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charge. The fupercargo faid that he did not mean to return to the veffel again at the time he left her for the purpofe of arranging the time and place of landing in the river.

LE BLANC J. (*a*) This was a queftion of fact for the jury, and I do not think that they have decided it wrongly. They confidered that this was not a fea-rifk, and that the underwriters only meant to infure againft fuch. The veffel at the time of the feizure was within the river *Jahde*, and that might be confidered to be her port, in a general fenfe, and within the meaning of the ftipulation. Our opinion does not contradict the decifion in the cafe cited; for that was not the cafe of a capture by a force from the land, but by a privateer from fea.

BAYLEY J. The ftipulation, that the veffel fhould be "free of capture and feizure in her port or ports of difcharge," meant to take away from the underwriters any rifk of land capture, and leave them only liable to fea-rifks: and the word *port* ought to receive a conftruction co-extenfive with that meaning. *Port* is here ufed in contradiftinction to *the high feas*. If this were otherwife, the fhip would have been fecured by this policy while failing up and down every river on the continent, watching for an opportunity of landing her cargo; which was manifeftly contrary to the intention of the parties. Unlefs therefore we read the word *port* in contradiftinction to *the high feas*, the contracting parties will not be put in the fame fituation in which they meant to put themfelves.

Rule refufed.

(*a*) *Grofe* J. was indifpofed and abfent.

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COCK *against* TAYLOR and Another.

Thurſday, May 2d.

The maſter of a ſhip having contracted by the bill of lading with the ſhippers to deliver goods to certain perſons or their aſſigns, *he or they paying freight for the ſame*; the demanding and taking of ſuch goods from the maſter by a purchaſer and aſſignee of the bill of lading, without the freight having been paid, is evidence of a new contract and promiſe on the part of ſuch purchaſer, as the ultimate appointee of the ſhippers for the purpoſe of delivery, to pay the freight, and he is liable for the amount in an action of indebitatus aſſumpſit brought againſt him by the ſhip-owner.

THE plaintiff, who was the owner of the veſſel *The Whim*, declared upon a general indebitatus aſſumpſit to recover 267*l.* for freight, primage, and average, due and payable to him from the defendant, for the carriage and conveyance of a certain quantity of barilla by the plaintiff on board his veſſel, from *Alicante* to *London*, and for his care and attendance in loading and unloading the goods; and alſo upon the common count for work and labour, care and attendance, &c. The bill of lading on which the firſt count was framed, was dated at *Alicante*, 19th *February* 1810, and ſtated the goods to have been "ſhipped by *Montgomery* and Co. upon *the Whim*, then riding at anchor in this bay, and bound to *London*: *to be delivered* in like good order, &c. *at the aforeſaid port of* London, (the dangers of the ſeas only excepted) unto the order of Meſſrs. *Hargreave* and *Dalzel* of *Algiers*, *or to their aſſigns, he or they paying freight for the ſaid goods*, as cuſtomary, with primage and average accuſtomed. In witneſs," &c. (Signed by the maſter). The bill of lading was firſt indorſed by *Hargreave* and *Dalzel*, to deliver the goods to the order of Mr. *Wm. Peters* of *Gibraltar*, and afterwards indorſed by the latter on the 4th of *April* 1810, at *Gibraltar*, to deliver them to the order of *Taylor* and Son of *London*, the defendants. *Peters* was ſtated to be the defendants' general agent at *Gibraltar*. The barilla arrived at the port of *London*, and was cleared and entered at the cuſtom-houſe there by the defendants' brother in their names about the middle of *May*. No demand of freight was made at the time of the delivery,

 and

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Cock *against* Taylor.

and none was then paid. It was objected at the trial before Lord *Ellenborough* C. J. at *Guildhall*, that the defendants, being mere purchasers of the goods from the original consignees, were not liable in an action for the freight; there being no contract either express or implied between them and the ship-owners; though it was admitted that the master of the vessel, having a lien on the goods for his freight, was not bound to have parted with them till it was paid. His Lordship however was of opinion that the action was maintainable against these defendants, as the ultimate appointees of the shippers for the purpose of delivery, and to whom the goods were actually delivered under the bill of lading, and which was a virtual assent by them to take the goods upon the terms of the bill. The plaintiff thereupon obtained a verdict for the amount of the freight.

Park now moved to set aside the verdict, in order to take the opinion of the Court upon the general point, whether the action for freight were maintainable against a mere purchaser of the goods from the original consignees, upon an implied assumpsit in law, without a special promise either before or after the delivery of the goods; there being, as he said, no privity of contract between the purchaser and the ship-owner; though he admitted that the latter was not bound to deliver before the carriage price of the goods was paid, and that the parting with his lien was a good consideration for a subsequent express promise to pay the carriage price: and thus far only he said the cases had gone. The case most in point is *Artaza* v. *Smallpiece* (a), where the bill of lading had been indorsed by the shipper (to whom or to whose order

(a) 1 *Esp. N. P. Cas.* 23.

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the goods were to be delivered) to one *Haynes*, of whom the defendant had purchased the goods, and had afterwards entered them in his own name at the custom-house. It was objected that the action should have been brought against *Haynes* the known consignee; but Lord *Kenyon*, admitting the right of the captain to retain the goods till the freight was paid, said that "if he part with the possession of them, he must then resort to his contract. In the case of goods consigned, the consignee is the person liable to the freight, not the person to whom he sells them: that would be to enhance the price on him, who must be supposed to buy them at a certain price independant of all charges; unless such charges are made part of the bargain. A right of action cannot be transferred from the person liable to another by such person's own act. He therefore who is first liable must remain so." And the plaintiff was nonsuited. The same point also came in judgment before Sir *W. Scott* in the case of *The Theresa Bonita* (a), where a demand for freight of the cargo was dismissed against one who had purchased it free of all expences from the consignee; the learned Judge saying, that the claim of the master on the goods being lost, he was cast back to the personal security of his freighters, who must be responsible to him. It appears indeed by a case of *Roberts* v. *Holt* (b), that it was as late as the 1 *Jac.* 2. before even the consignee named in the bill of lading was holden liable in an action for the freight on receipt of the goods (c); and that was so determined upon the custom of merchants. In *Ward* v. *Felton* (d), the

(a) 4 *Rob. Adm. Rep.* 236. (b) 2 *Show.* 433.

(c) *Vide the case of Penrose and Others* v. *Wilkes*, Sittings at *Guildhall* after *Hil.* term 1790, before Lord *Kenyon* C. J., cited in *Abbott's Law of Merchant Ships*, &c. 259.

(d) 1 *East*, 507.

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the defendant, who had made the entry at the custom-house of the tobacco which was landed and deposited in the King's warehouse, acted merely as agent for another, within the knowledge of the captain, and was therefore holden not to be liable for the freight.

Lord Ellenborough C. J. I cannot think that the opinion delivered in the case of *Artaza* v. *Smallpiece* was well founded; and though it was not mentioned by Sir *Wm. Scott* in the case before him, as the ground of his decision, yet having been cited and relied on in the argument, as shewing the rule on which the courts of law proceeded, it probably influenced his judgment on that occasion. But it appears to me, that though there were no original privity of contract between these parties for payment of the freight, yet the taking of the goods from the ship by the purchaser under the bill of lading is evidence of a new agreement by him, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight due for the carriage of such goods, the delivery of which was only stipulated with the shippers to be made to the consignees named in the bill, or their assigns, *he or they paying freight for the said goods*. The case never appears to have been presented in that view upon any former occasion when the same point was brought before Lord *Kenyon*.

Le Blanc J. (a) The purchaser must have understood at the time, that the goods were liable to be detained for the payment of the freight, if it were not paid before delivery; and his receiving them from the master, and the master's parting with his lien and giving them up to the

(a) *Grose* J. was indisposed and absent.

purchaser

purchaser at his request, is evidence of a new contract between them that the purchaser would pay the freight.

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BAYLEY J. The contract of the master with the shippers was to deliver the goods to *Hargreave* and *Dalzel*, or their assigns, *he or they paying freight for the said goods*, &c. The indorsees therefore of the bill of lading knew that they had no right to take the goods from the master without payment of the freight. There was another case upon this subject decided before Lord *Kenyon* subsequent to the decision which has been mentioned; and that is *Lodergren* v. *Flight and Another*, at *Guildhall* sittings after *Trinity* term 1796, which was cited in the argument of *Hanson* v. *Meyer*, 6 *East*, 622. It was an action for the freight of some tar, brought by the plaintiff, who was master and owner of the ship, against the defendants, who had purchased the tar before its arrival of *Hippius* the consignee, from whom they received two bills of lading, including in the purchase-money a proper allowance for freight and duty, which were to be paid by *Hippius*. After the ship arrived and was entered and reported by *Hippius*, and after the delivery of a certain number of barrels of the tar, *Hippius* failed, and the plaintiff refused to deliver the remaining barrels to the defendants, unless they would pay the freight not only of the barrels which remained on board, but of those which had been before delivered; which latter they refused to do; though they offered to pay the freight of those which remained on board. But it was at last agreed that the delivery should be made without prejudice, and that the action should be brought by the plaintiff to recover the whole freight. The defendants paid into court as much as would cover the plaintiff's demand for freight on all the tar comprised in one

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one of the bills of lading; which bills of lading were in the same form as the present. And the plaintiff under Lord *Kenyon*'s direction recovered the entire amount of the freight; his Lordship considering that the contract for the freight was entire; the goods belonging to the same person and under one consignment; and that he had a lien for the whole freight on the residue of the barrels which remained on board. There it appears that the purchasers made themselves liable by the taking of the residue of the cargo, not only for the freight due on such residue, but for the freight due on the part which had been before delivered, and which they had refused to pay. Here then I think that the purchasers' taking the cargo from the master, who had a lien on it, was evidence of their agreement upon the master's delivering up the goods without receiving the freight, to pay the freight which should be due, and without which they had no right to take the goods.

Lord Ellenborough C. J. then observed, that the principle on which this case proceeded was distinguishable from that of *Cook* v. *Jennings* (a): and in that case Mr. Justice *Lawrence* considered that the subsequent receipt of the goods by the owner at the place where the ship was wrecked, though it would not enable the ship-owner to recover freight upon the original contract in the charter-party, pro ratâ itineris, might be evidence of a new contract between the parties.

Rule refused.

(a) 7 *Term Rep.* 381, 5.

DOE, Lessee of CLARGES, Bart. *against* FORSTER.

Thursday, May 2d.

A notice to quit at *Michaelmas* served personally on the tenant, who made no objection at the time, is primâ facie evidence from which the jury may find that the tenancy commenced at that period.

THIS was an ejectment against a tenant, to recover possession of lands which he held under the lessor of the plaintiff; who proved his case at the trial before *Le Blanc* J. at *York*, by shewing receipts for half a year's rent up to *Lady-day* and *Michaelmas* O. S. respectively, and a notice to quit at *Michaelmas*, which was served on the 6th of *April* preceding by the steward on the defendant personally, who then made no objection to the time of quitting mentioned in the notice. The defendant's counsel objected, that the time of entering being equivocal upon the receipts for rent, the mere circumstance of the landlord's giving notice to quit at *Michaelmas* was no evidence that the tenancy commenced at that time. But the learned Judge having held the evidence given to be primâ facie sufficient to be left to the jury of a holding from *Michaelmas*, the jury found a verdict for the plaintiff.

Richardson now renewed the objection, upon a motion for a new trial; and said, that though the proof of a notice to quit at a particular time had been once held sufficient to throw upon the tenant the proof that his tenancy commenced at a different time, by *Eyre* B. in the case of *Doe d. Puddecombe* v. *Harris* (a); yet recently, in the case of *Doe* v. *Calvert* (b), Lord *Ellenborough* denied that doctrine, and nonsuited the plaintiff upon similar proof; saying that all the Judges, he believed, were now

(a) At *Dorchester* Summer Assizes 1784, cited in 1 *Term Rep.* 161.
(b) 2 *Camp. N. P. Cas.* 388.

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of a contrary opinion. He admitted that the notice to quit in that case was not proved to have been served personally on the tenant; but contended that that made no essential difference, unless it had been shewn that the attention of the tenant had been called particularly to the time of quitting mentioned: but here it did not even appear that the tenant had read the notice served on him in the presence of the witness who served it.

Le Blanc J. No question was asked of the witness whether the defendant read the notice or not at the time: but the objection was afterwards taken that this was not evidence to go to the jury of a tenancy from *Michaelmas*. I thought that as the notice to quit at that time was served personally on the tenant, and he then made no objection to the time, it was primâ facie evidence to go to the jury of a *Michaelmas* holding; and I was not aware that the case decided by Mr. Baron *Eyre* had ever been overruled where there had been a personal service of the notice to quit on the tenant, who then made no objection to it; but only where the proof of the time of holding rested merely upon the service of a notice to quit left at the house of the tenant, which gave him no opportunity of objecting at the time.

Lord Ellenborough C. J. I believe it is now considered by all the Judges that the mere notice to quit at a certain time given by the landlord is not in itself sufficient evidence of a holding from that time: but here there was something more, namely, the personal demeanour of the tenant at the time he received it; he making no objection to the time stated. The defendant did not go to the jury on the fact, as he might have done, when the jury would

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have had to consider, whether he saw or knew the contents of the notice served, and whether or not he acquiesced in the statement of the time at which he was to quit. If indeed the witness had been questioned as to the fact, and had made answer that the defendant did not look at the paper at the time so as to know its contents, that would have rebutted the idea of his acquiescence as to the time stated for his quitting. But as it is, I cannot say that this was not primâ facie evidence, from the demeanour of the defendant at the time of receiving the notice, for the consideration of the jury.

The Court (*Grose* J. absent) thereupon refused the rule.

On the same day a motion was made by *W. E. Taunton* to set aside a verdict obtained by the lessor of the plaintiff in another case, before *Lawrence* J. at *Hereford*; but as he could not state (in answer to a question from Ld. *Ellenborough* C. J.) whether the notice to quit at the particular time, (which was the evidence relied on to shew the commencement of the tenancy,) had been personally served on the tenant, the Court refused the rule.

HIGGINS *against* HIGHFIELD and Another.

Thursday, May 2d.

The defects of a declaration in an action for mesne profits, in not stating *any time* when the defendant broke and entered the messuage, &c. and ejected the plaintiff from the occupation of it; and in stating only that the defendant kept and continued the plaintiff so ejected *for a long space of time*, without stating *how long*; are cured by the operation of the stat. 4 *Ann.* c. 16. after judgment by default and a writ of inquiry of damages executed; so that no objection can be taken in arrest of final judgment for such defect in form.

THIS was an action brought for mesne profits, in which the declaration, entitled of *Michaelmas* term 51 *Geo.* 3. stated that the defendants broke and entered one messuage, &c. situate at the parish of *Standon* in the county

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county of *Stafford*, and ejected the plaintiff from the possession and occupation thereof, and kept and continued him so ejected *for a long space of time*, and during all that time took and received to the use of them, the defendants, all the issues and profits of the said premises, *being of a large yearly value*, and cut down and destroyed divers large quantities of grass, corn, and hay, &c. by reason of all which said several premises, the said farms, lands and premises were much injured, &c., and the plaintiff *during all the time aforesaid* not only lost the rents, issues and profits, &c. but was deprived of the means of cultivating the same, and was obliged to expend and did expend divers large sums of money in recovering the possession, &c. After judgment by default, and a writ of inquiry executed at the last assizes at *Stafford*, and 460*l.* damages awarded thereon;

Peake moved in arrest of judgment, because no time was charged in the declaration when the acts complained of were committed; nor is it stated for what space of time the defendants wrongfully dispossessed the plaintiff and held the premises. And though the plaintiff would not have been tied down to strict proof of the time if it had been stated, yet still there ought to be some certain time stated on the record, in conformity with all the precedents of pleading. And he referred to *Blackall* v. *Heal*, *Com. Rep.* 12. and to a case of *Wall* v. *Duke* there cited; in which latter the plaintiff declared upon a trespass committed diversis diebus et vicibus, without alleging any day; which was held to be aided only after verdict. And so in the principal case, where a day was laid for the trespass, which was not then come, which was the same as if no day at all had been laid, it was said to be impossible

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for the jury to have given damages for a trespass committed on a day that never was; and therefore of necessity the plaintiff must have proved in evidence a trespass committed before the action brought, otherwise he could not have had a verdict for him; and so the verdict aided the mistake of the day. But that reason does not apply to the case of a judgment by default; for whether the plaintiff proved any day or not, before or after the action brought, the verdict must still have been for him. [*Bayley* J. That case was before the statute 4 *Ann. c.* 16.] Neither the statute of *Anne* nor that of *James* apply, because they only help pleadings in which a day has been once properly laid.

Lord Ellenborough C. J. No doubt this declaration would be holden bad on special demurrer; but we must recollect the healing quality of the statute of *Anne*; which, after directing that, upon any demurrer joined, judgment shall be given "according to the very right of the cause "and matter in law, without regarding any imperfection, "omission, or defect in any declaration, &c. whatso-"ever," extends the statutes of jeofails to judgments by default, and directs that no such judgment, nor any judgment on any writ of inquiry of damages executed thereon, shall be reversed for any imperfection, omission, defect, matter, or thing, which would have been aided by any of the statutes of jeofails after verdict. The question therefore is, whether there be any substantial defect in this declaration? There is a defect in the want of alleging a certain date; for it only states that the defendant ejected the plaintiff from the possession and occupation of the premises, &c. and kept him out *for a long space of time*: but there is no defect in the allegation of the plaintiff's title to recover for

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the wrongful expulsion. It must have been for some time before the action brought; and it appears on the record when the action was brought. The not specifying the particular time therefore is not matter of substance, but only of form; which is helped by the statute, unless shewn for special cause of demurrer.

LE BLANC (a) and BAYLEY Justices, agreed; and the latter observed, that the want of alleging a certain time could only be matter of form, for the plaintiff would not have been tied down to proof of the particular day if he had stated it.

Rule refused (b).

(a) *Grose* J. was indisposed and absent.
(b) Vide *Bowdell* v. *Parsons*, 10 *East*, 359.

Friday, *May* 3d.

GLADSTONE *against* NEALE.

A contract for the purchase of a certain parcel of hemp, the exact amount of which, not being known at the time, was described in the contract as *about* 8 tons, may be declared on as a contract for eight tons, the certain quantity which it was afterwards proved to be, which quantity was laid under a videlicet.

IN an action on the case for the non-performance of a contract, whereby the defendant agreed to purchase certain hemp of the plaintiff at 76*l*. per ton, the contract proved was in the terms of it for "*about eight* tons;" the exact amount of it not being known at the time when the contract was entered into: but before the action brought the exact amount of it was ascertained, and it was laid, under a videlicet in the declaration, as a contract for the certain quantity of eight tons, which it proved to be. Whereupon *Park*, at the trial before Ld. *Ellenborough* C. J. at *Guildhall*, objected to the variance between the contract as laid and that proved: and the objection being overruled, and a verdict taken for the plaintiff, he now moved to set aside the verdict, and enter a nonsuit, upon the variance. But

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The Court (*a*) all agreed with his Lordſhip that there was no material variance. The contract was for a particular quantity in the contemplation of the parties at the time, though the exact amount of it was not then known to them, and therefore they called it *about* 8 tons: but when the parcel of hemp contracted for had been weighed, and its preciſe amount aſcertained, it was in effect a contract for that preciſe quantity, as it was laid in the declaration.

LE BLANC J. added, that perhaps it might have been moſt accurately alleged in the declaration, that the parties contracted for a certain quantity of hemp, the amount of which was not exactly known to them at the time, but which was then ſuppoſed and deſcribed to be *about* eight tons; but which afterwards turned out to be eight tons, &c.

Rule refuſed.

(*a*) *Groſe* J. was indiſpoſed and abſent.

The KING *againſt* The Inhabitants of the County of OXFORD.

Saturday, May 4th.

The Court refuſed a certiorari to remove an indictment for a miſdemeanor, and proceedings thereon at the aſſizes, after conviction and before judgment, which was prayed for the purpoſe of applying for a new trial, on the Judge's report of the evidence, upon the ground of the verdict being againſt evidence and the Judge's direction.

THIS indictment, for the non-repair of a public bridge over the river *Cherwell*, called *Enſlow Bridge*, within the county of *Oxford*, was preferred at the aſſizes for the county of *Oxford*, and was tried before *Lawrence* J. at the laſt aſſizes at *Oxford*, when the defendants were found guilty; the queſtion made at the trial being whether certain perſons were bound to the repair ratione tenuræ. And now

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Jervis, on behalf of the defendants, prayed the Court for a certiorari to remove the indictment and proceedings into this court, for the purpose, as he stated, of moving for a new trial; the verdict being against the evidence and the direction of the learned Judge who presided at the trial. He admitted that in the case of *The King* v. *Elizabeth Nicoll* (a), where the proceedings on an indictment at *Hicks's*

(a) This case is very imperfectly reported, upon all the points, in 2 *Stra.* 1227., which was the report now referred to. The following note of the same case is taken from Mr. *Ford*'s MS.

Where two conspire, and one dies, the other may still be indicted for the conspiracy.

The KING *against* NICHOLS, *M.* 17 *Geo.* 2. 1742 —The defendant was indicted for a conspiracy at *Hicks's Hall.* The jury found him guilty of a conspiracy with one *Bygrave.* They likewise found that *Bygrave* died before this indictment was found; and therefore pray the advice of the Court whether the defendant were guilty, as laid in the indictment. This special verdict (1) was removed here by certiorari; and now

Serjt. *Urlen* insisted that this defendant was indictable for the conspiracy, notwithstanding one of the conspirators was dead before the indictment was found. *Rex* v. *Kinnersley*, *Trin.* 5 *G.* 1. (1 *Stra.* 193.) Two were indicted for a conspiracy; one pleaded and was convicted; and it was held that his trial and conviction were good, although the other conspirator did not come in and plead. And so, he said, was the opinion of my Lord *Hale*; viz. that if one be found guilty, and the other do not come in upon process, or die pending the suit, yet judgment shall be had against the person convict. He likewise said that the defendant could not take advantage of this after trial, supposing he could have done so before: and compared it to the case of principal and accessary; if the principal do not appear, the accessary shall be put to answer; but he shall not be tried till the principal be attaint, or appear, unless he will; for he may wave the benefit of the law, 2 *Hale's P. C.* 224.

Serjt. *Hayward*, e contrà, insisted that one person only could not be guilty of a conspiracy; and therefore if all the defendants but one who are prosecuted for a conspiracy be acquitted, the acquittal of the rest is the acquittal of that one also. Upon the same ground it has been held that no such prosecution is maintainable against a husband and wife only, be-

(1) This was not a special verdict properly so called, but rather a special finding of a particular fact, as a guide to the judgment of the Court, whether, taking the particular fact to be as stated by the jury, they were warranted by the evidence in finding a general verdict of guilty.

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Hicks's Hall for a conspiracy were removed by certiorari between verdict and judgment; this Court, referring to *The* 1811.

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cause they are esteemed but as one person in law. This case stands upon the same principle; for *Bygrave* being dead, no indictment can be found nor evidence received against him. But suppose *Bygrave* had been indicted, and died pending the suit, the defendant must have been acquitted, because the conspiracy must be proved between two at least; and *Bygrave* being dead, no proof could be given against him. If two executors be sued in assumpsit, and one die, the writ shall abate. 1 *Leo.* 165. *Ward* and *Blend*, *Plow.* 1S6. Before the stat. 17 *Car.* 2. *c.* 8. if either party had died betwixt the verdict and judgment, no judgment could be entered up afterwards: and if it were, the death of the party was assignable for error. *The King* against *Drinkwater*; indictment for taking money of the owner for helping him to a gold watch that had been stolen: but the person who stole the watch being dead, Mr. Justice *Denton*, who tried the cause at the *Old Bailey*, held that the indictment could not lie on the statute.

LEE C. J. said, he did not know any case or instance of a special verdict found at *Hicks's Hall* removed into this court: and it has been held that if a conviction be removed here by certiorari, this Court will not give judgment upon it. *Carth.* 6. *Rex* v. *Baker*. It is certain that in all conspiracies there must be two at least, or no indictment will lie; and therefore if one be acquitted, the other cannot be guilty. But that case differs; because one being acquitted on record, the conviction of his companion on the same record must be directly repugnant and contradictory to the other. But there can be no such contradiction in the present case, any more than where one of the conspirators refuses to come in; yet judgment may be given against the other. *Staunf. P C.* 173. *b.* 174. If, in an action of conspiracy against two, the one be attaint and found guilty, and the other bar the plaintiff by demurrer in law; yet that shall not discharge the other who is attaint, if the cause of the demurrer do not go to the gist of the conspiracy. The same law holds, if in conspiracy against two, the one come in and plead, and his plea be found against him, judgment shall be given against him, although the other be not attaint.

Sed adjornatur, to be argued again; and afterwards, as I have heard, judgment was given for the king.

This case was now moved again; and Sir *John Strange* cited several cases to shew that although *Bygrave* was dead before this indictment was found, yet judgment might be given against the defendant. *Trin.* 5 *G.* 1. *Rex* v. *Kinnersley* The defendant was indicted for a conspiracy, for that he and one *Moor* conspired to charge a noble Lord with sodomitical prac- *Mich.* 18 *G.* 2.

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The King v. *Baker* (a), said that they could not give judgment, not being apprised of the circumstances of the offence. But that difficulty will not arise in this case, where

(a) *Carth* 6. The course adopted in that case, which was in *Trin.* 3 *Jac.* 2. was singular. The defendant having been indicted and convicted at *Kingston-upon-Hull*, (whether at the quarter-sessions or assizes does not appear) the proceedings were removed into this court by certiorari, and the Court was moved to give judgment upon the conviction. But (the report states) this motion was opposed as irregular, *because* B. R. *never gives judgment upon a conviction in another court* (1); "but the practice is, if, *after issue joined* in another court, the indictment is removed, the party is always admitted *to wave the issue below*, and to plead de novo, and to go to a trial upon an issue joined in this court." The Court, however, upon that occasion carried their practice beyond that which was stated, of admitting the defendant to wave *the issue joined* below; for, according to the report, he was permitted to wave *a verdict of guilty*; inasmuch as they directed a *new trial*, without, as far as it appears, any consideration of the evidence on which the conviction was founded; a practice which certainly does not exist at this day.

(1) But see *Dal.* 25. *pl.* 7.

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ties: *Kinnersley* only appeared, and was found guilty. It was objected that two being necessary to constitute a conspiracy, the Court could not give judgment till *Moor* was brought in and tried. But the Court held clearly that as the indictment was found against *Kinnersley and another*, and *Kinnersley* was found guilty, they might give judgment against him. And *Pratt* C. J. put this case, suppose *Moor* should die, that surely could not excuse *Kinnersley*; and yet if this objection should hold, *Kinnersley* in that case could never be tried. *Pasch* 7 *Ann Queen* v. *Horne*; indictment for a conspiracy that the defendant, cum *A* et multis aliis, did conspire: *A* was acquitted, and *Horne* found guilty. The same objection was then taken: but the Court held clearly, that it being laid in the indictment, that the defendant cum multis aliis, &c.; that was sufficient to warrant the Court to give judgment. 24 *E* 4. 34 *b*. *Bro. Conspiracy*, 21 in point. 24 *Ed*. 3. 73. *a*. S. P. This case is much stronger than *Kinnersley*'s, because *Moor* was living, and might possibly be brought in afterwards and acquitted: but the presumption was so strong to the contrary, that the Court held themselves sufficiently authorized to proceed to judgment. In the present case *Bygrave* is dead, and there never can be an acquittal, and consequently no contradictory judgment, as there might be in other cases.

A certiorari will not lie to the Sessions to remove a conviction for a misdemeanor before judgment; for the fine being uncertain, the Court cannot tell how to assess it. Otherwise where the punishment is certain.

The next question was, Whether this Court can give judgment in the present case, because this being a conviction for a conspiracy, and the fine

where the object is to bring the whole evidence in review before the Court upon the learned Judge's report. It is of great consequence to those concerned that a verdict

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fine discretionary in the Court, according to the circumstances of the case, as it appeared upon evidence at the trial; the justices who tried the merits are the only proper judges to assess the fine. And in *Carth.* 6. *Rex* v. *Baker*, it is said that the Court of King's Bench never gives judgment upon a conviction in another court. But

Sir *John Strange* said it was expressly determined otherwise in the case of *The King* v. *Athoe*, *Trin.* 9 *G.* 1. The defendants were indicted and tried in the county of *Hereford* for a murder in *Wales*; that being the next *English* county; and both found guilty of murder: but because their counsel insisted that this was a mis-trial, and the judges who tried the defendants could not give sentence to execute them, the record was afterwards removed here by certiorari, and the defendants brought up by habeas corpus to receive sentence. And the Court held that this trial in the next *English* county was good. It was then moved in arrest of judgment, that this Court could not proceed to give sentence, because by the statute that power is given to the judge of assize who tried the cause; but it was over-ruled, because this Court may pass sentence on a criminal convicted in any *English* county; and sentence was given accordingly. The only difference between the cases is, that there the judgment was certain, and no discretionary power in the Court: here the judgment is uncertain, and the fine to be assessed according to the circumstances.

LEE C. J. If the circumstances of this case had been known at the time of moving for a certiorari, this Court would not have removed the indictment. This is called a special verdict, but I do not find any thing stated to bring it within that description. The indictment is that the defendant conspired with one *Bygrave*; and the jury find that *Bygrave* was dead at the time of the indictment. As to the point of law, it is clear from the cases that have been cited, that the Court will be well warranted in giving judgment against the defendant. So was the case of *Kinnersley*: indictment that he and another, one *Moor*, did conspire; and *Kinnersley* only appeared and was found guilty: and yet the Court held clearly that he was guilty of the conspiracy charged in the indictment, although *Moor* was not brought in and tried. *Trin.* 11 *W.* 3. *Rex* v. *Sudbury*, cited by *Eyre* J in *Kinnersley*'s case: indictment for that *A.* and *B.* and six other persons, cum multis aliis, illicito, riotosè, et routosè assemblaverunt, &c. *A.* and *B.* were found guilty, and the other six acquitted; and yet the Court was of opinion that *A.* and *B.* were guilty of the riot charged in the indictment, and gave judgment accordingly; for although three are necessary to constitute a riot; yet two only

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dict given against evidence and the direction of the Judge should in some mode or other be corrected.

Lord ELLENBOROUGH C. J. It is also of great consequence that we should not, without precedent, and against authority, intrude upon all the inferior jurisdictions in the kingdom, (for if we do it in one case, there is no reason why we should not be called upon to do it in all,) by removing hither their proceedings after verdict and before judgment, for the purpose of examining the evidence on which the verdicts have been obtained. There would be no end of such investigations. But I would not have the notion for a moment entertained, that we have the power of entering into the merits of verdicts, and granting new trials in proceedings before inferior jurisdictions.

BAYLEY J. (*a*) assenting, the certiorari was denied (*b*).

(*a*) *Grose* and *Le Blanc*, Justices, were indisposed and absent.

(*b*) In capital cases at the assizes, if a conviction take place upon insufficient evidence, the common course is to apply to the Crown for a pardon, upon a full report of the evidence sent in by the learned Judge to the Secretary of State for the home department: but I am not aware of any instance of a new trial granted in a capital case: and upon the debate of all the Judges, in *Margaret Tinker*'s case, in 17[illegible]1, it seemed to be considered that it could not be. The authorities are numerous that an inferior jurisdiction cannot grant a new trial upon the merits, but only for an irregularity. See *Hall* v. *Hill and Others*, 7 *Mod.* 84. *Holt's Rep.* 184. *Salk.* 650. *Brook* v *Evans*, 1 *Stra.* 113. *Lamy* v. *Boorne*, *ib.* 392. *Jewell* v *Hill*, *ib.* 499. *Street*'s case, 7 *Vin. Abr* 245. *Rex* v *Ulling*, *Fort.* 198. *Rex* v. *Day*, *Sayer*, 202 *Blacquiere* v. *Hawkins*, *Dougl.* 380. And in *Trevor* v. *Wall*, 1 *Term Rep.* 153. The Court said there was no instance of a court of error granting a venire de novo where the proceedings originated in an inferior court.

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may be indicted for a riot cum multis aliis. It is clear therefore in the present case, that the defendant is well convicted; but the question is, whether we can give judgment; because this being a misdemeanor, and finable only; the fine must be apportioned according to the nature and circumstances

circumstances of the case, as they appeared upon evidence; and being tried at the Sessions, we can have no information of the merits. If this trial had been before a judge of this court, we might have had his report. There are cases where a procedendo hath been granted in case of removals; but I think the proper way here will be to quash the certiorari, quia erronice emanavit. 1 *Salk* 150. *The Queen* v. *Dixon*. 6 *Mod* 6[illegible]. it is held that a certiorari after conviction ought to remove the indictment and conviction; and if it make mention of the indictment only and not of the conviction; it may be quashed. But let the case stand over, and we will consider whether we can quash this certiorari, quia erronice emanavit. — Mr. Justice *Denison*. The certiorari mentioned the indictment only, and took no notice of the conviction.

POTTER *against* RAYWORTH.

Saturday, May 4th.

The indorsee of a promissory note may recover upon it against the payee and indorser, on evidence of a promise to pay it, made, some time after the dishonor of the note, by him to a subsequent indorsee, who then held it; without direct proof by the plaintiff, that due notice of the dishonor was given to such payee and indorser.

THE plaintiff declared on a promissory note made by *J. Elkington* on the 21st of *November* 1810, whereby he promised to pay at *Esdaile* and Co. Bankers in *London*, to the order of the defendant 15*l.* 8*s.* 8*d.* value received; which note was stated to have been indorsed and delivered by the defendant to *J. Fulford*, who indorsed and delivered the same to the plaintiff; and that when the note became payable on the 24th of *December* 1810, it was presented for payment at *Esdaile* and Co.; but that neither *Esdaile* and Co. nor *Elkington* would pay the same; of all which the defendant had notice, and by means thereof became liable to pay the amount to the plaintiff, &c. It appeared in evidence that the note was negotiated in the country, and was indorsed and delivered by the defendant to *Fulford*; by him to *Potter*; by him to *Kirton*; and by him to others, before it was presented for payment when due, and dishonored. No notice however of the dishonor reached the defendant in *London* till the morning of the 7th of *January* 1811, when *Kirton*, having then taken up the note, called, together with *Fulford*, at the defendant's house, (not having found him at home the evening before when he first called:) the defendant

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then promised to pay *Kirton* the next day. Having failed however in this engagement, *Kirton* resorted to *Potter*, his immediate indorser, from whom he obtained payment: and now *Potter* brought this action against the defendant, the first indorser, who objected to the want of due notice of the dishonor. But the promise made by the defendant to *Kirton* on the 7th of *December*, when the note was in *Kirton*'s hands, was relied on by the plaintiff, either as an admission by the defendant that he had due notice of the dishonor of the note, or a waver of such notice if he had not had it. This conclusion was resisted by the defendant, on the ground that the promise was to a third person and not to the plaintiff, or even in his presence; and therefore not within the case of *Lundie* v. *Robertson* (*a*). The plaintiff however recovered a verdict by the direction of *Graham* B. before whom the cause was tried at *Worcester*. And now

Abbott moved to set aside the verdict and for a new trial, on the same ground of objection which had been taken at the trial. But

Lord ELLENBOROUGH C. J. said, that whether the promise to pay were made to the plaintiff or to any other party who held the note at the time, it was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had had due notice of the dishonor.

BAYLEY J. (*b*) considered the promise by the defendant either as an acknowledgment that he had had due notice

(*a*) 7 *East*, 231.
(*b*) *Grose* and *Le Blanc*, Justices, were indisposed and absent.

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of the diſhonor, or that without ſuch notice he was the proper perſon to pay the note, as the party for whoſe uſe it was drawn.

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Rule refuſed.

The KING *againſt* The Biſhop of LONDON.

Monday, May 6th.

The act of uniformity, 13 & 14 *Car.* 2. *c.* 4. *ſ.* 19., having enacted that no perſon ſhall be allowed to preach as a lecturer, in any church, &c. "unleſs he be "firſt approved "and thereunto "licenſed *by* "*the Archbiſhop* "*of the province,* "*or Biſhop of* "*the dioceſe,*" &c. the Court will not entertain a motion for mandamus to the Biſhop to licenſe a lecturer appointed by the pariſh, upon the previous refuſal of the Biſhop to do ſo upon the alleged ground of unfitneſs in the party elected, unleſs it be ſhewn that the like application had alſo been made to the Archbiſhop, and rejected by him.

C. *Warren* obtained a rule in *Michaelmas* term laſt, calling upon the Biſhop to ſhew cauſe why a mandamus ſhould not iſſue, commanding him to licence the Rev. *R. Povah*, B.L. to preach the *Friday* morning lecture at the pariſh church of *St. Bartholomew*, Exchange, *London*. He ſtated that the lectureſhip was endowed in 1625 with 25*l.* a year out of lands, and the choice of the lecturer was given by the founder to the inhabitants of the pariſh. That, upon the laſt vacancy, the rector of the pariſh, Mr. *Povah*, and another perſon, were candidates; and that a majority of the pariſhioners had choſen Mr. *Povah*, who had thereupon tendered himſelf to the Biſhop with the uſual certificate of his election, ſigned by the rector himſelf and the churchwardens; and (finally) with a certificate of his being in prieſt's orders: and that he had offered to read and ſubſcribe the 39 articles, as required by the act of uniformity 13 & 14 *Car.* 2. *c.* 4. *ſ.* 19. That the Biſhop's objections were at laſt reſolved into *this, that he did not approve of Mr.* Povah *as a fit perſon*. That Mr. *Povah* had thereupon called upon the Biſhop to ſpecify the reaſons of that objection, and had tendered himſelf to ſubmit to any examination which the Biſhop thought proper to inſtitute: but that the Biſhop had not thought proper to inſtitute ſuch examination, or to ſpecify the reaſons of his refuſal to licence the applicant, otherwiſe than by a

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general declaration of his unfitness. He referred to the opinion of Ld. C. J. *Lee* in *The King* v. *The Bishop of London* (*a*), that the ground for applying for a mandamus in

(*a*) 1 *Wils.* 11. 15. *Vide* the case there referred to of this very lectureship, as reported in *Holt's Rep.* 418. by the name of *The Churchwardens of St. Bartholomew's Case*, *M.* 12 *W.* 3., which is also reported in 3 *Salk.* 87. with the addition only of the names of the several parties concerned. The same case is very clearly stated by Lord C. J. *Lee*, in giving judgment in the case of *The King* v. *The Bishop of London*, *E.* 16 *G.* 2.; a fuller note of which judgment is here given from Mr. *Ford's* MS.

The act of uniformity, 13 & 14 Car. 2. c. 4. s. 19., *having made a licence necessary to enable a lecturer to preach, and given authority to the Bishop, &c. to grant it*; if a person appear to have a right to it, this Court will compel the Bishop, &c. to grant such licence, or to shew good reason to the contrary. But it is a good reason against an application for such a licence to shew that the *lectureship was appointed within time of memory, and supported by voluntary contributions, without any lay fee or temporal right in the party applying*; and that *he had not the consent of the rector*; *though chosen by the parishioners to be lecturer.*

Lord C. J. LEE (et per Curiam). There can be no question but this Court hath jurisdiction in all cases of this nature; but the question is, Whether this be a proper case for the Court to exercise that jurisdiction? The case itself is no more than this; that the parish of *St. Anne, Westminster*, being made by act of parliament a separate and distinct parish, the inhabitants agreed amongst themselves to constitute a lecturer, who has ever since been elected by a select vestry, and supported by the voluntary contribution of the inhabitants. That the lectureship being vacant, Mr *Church* was elected by a majority of the select vestry to be lecturer; and that Dr. *Pelling*, the rector, received him as such. That Mr. *Dawney* was appointed by 500 or more of the inhabitants; but that Dr. *Pelling* hath refused to receive him, or lend him the use of the pulpit. So that it appears upon the state of this case, that here is a lectureship appointed within time of memory, supported by voluntary contributions, without any lay fee or temporal right vested in any body; that there is no usage or prescription to give the lecturer a right to preach here: and therefore the question is, Whether, under these circumstances, this Court ought to grant a mandamus, where the minister refuses to admit the lecturer?

The foundation of applying to this Court in cases of this nature is, that the statute of uniformity having made a licence necessary, and vested that authority in the Bishop, this Court will not suffer him to exercise that authority arbitrarily; but, where a person appears to have a right, will compel the Bishop to grant a licence, or shew good reason to the contrary; and so it was held by my Lord C. J. *Holt*, in the case that hath been mentioned of *Rex* v. *The Churchwardens of St. Bartholomew*. But, on the other hand, where it appears that the person who applies for a licence has no right, or that if a licence were granted it would have no effect; this Court will not interpose, nor command, &c.; for lex non cogit ad inutilia. Before this statute was made, it was lawful for the churchwardens to prevent any stranger from preaching in the church without shewing his licence to them. *Wats. Clerg. Law*, 256. 2 *Bulst.* 49. in *Creswick* and *Rokesby's* case. And that he could not preach there without leave of the minister is pretty clear, because the soil and freehold of the

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in these cases is upon the statute of uniformity, whereby all persons are forbidden to preach as lecturers without a licence; and that it was not in the Bishop's power to withhold his licence whenever he pleased. But, if the Bishop may refuse to licence, upon a general allegation of unfitness, it enables him to withhold his licence at plea-

the church is only in the parson and in no other. *Cro. Jac.* 366. *Francis* v. *Ley*, reported in *Noy*, 104. by the name of *Day* against *Beddingfield and Others*: and therefore neither the Ordinary nor churchwardens can licence a parishioner to bury within the church, but only the parson.

His Lordship said he had a full report of the case of *The King* against *The Churchwardens of St. Bartholomew's*, which came before the Court *Mich.* 12 *W.* 3. upon a motion for a prohibition. That was the case of a lectureship founded by a private person with a salary of 50*l* per ann. annexed to it, for a lecturer to preach every *Thursday*; and it was directed that the inhabitants should choose a lecturer every year. They accordingly chose one *Turton*, and for several years re-chose the same person: but at last they chose one *Rayner* to be lecturer. *Turton* insisted that he was lecturer for life, and as such insisted upon a right to preach in the church on *Thursdays*; but the churchwardens refused to open the doors: upon which *Turton* libelled in the spiritual court, and had an inhibition there to inhibit *Rayner* to preach, and also a monition to the churchwardens to open the doors of the church to *Turton* on *Thursdays*; and upon that a prohibition was moved for. And it was held by my Lord C. J. *Holt*, that although it was punishable by the statute for any person to be lecturer and preach without licence, yet the Ordinary had no power over the right, nor has he an arbitrary power to license or not, but was bound ex justitia to license if the person were orthodox, and an honest liver, and loyal. And as to the churchwardens, it was true that on *Sundays* and holidays they are bound to open the doors of the church to the parson, or to whom he shall appoint; and if they refuse, they are punishable in the spiritual court: but the Ordinary hath no power to compel the churchwardens to open the doors to persons not appointed by the parson: and a prohibition was granted to declare in. To compare that case with the present; here is a person, a mere stranger, not received *by the Rector*, and consequently one that hath no right to preach in this church, applies to the Bishop for a licence; and, upon his refusal, applies to this Court for a mandamus, &c.: but as the Ordinary hath no power to command the doors of the church to be opened to Mr *Dawney*, nor to enable him to preach there, without the Rector's consent; this Court will not grant a mandamus to the Ordinary commanding him to license Mr *Dawney* to preach in this church, nor force a man into the pulpit against the consent of the minister. Per Curiam, The rule for a mandamus must be discharged.

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fure. In that cafe however the mandamus was refufed, becaufe it was not an endowed lectureſhip, and the rector might, notwithſtanding the licence, have refufed the ufe of his pulpit. [Lord *Ellenborough* C. J. That cafe only ſhews that the Biſhop has not an arbitrary power of refuſing a licence, but he muſt exercife his diſcretion fairly upon the fitnofs of the perfon applying to him, fecundum æquum et bonum.] The Biſhop has not even examined Mr. *Povah*. There is an inchoate right in the inhabitants of the pariſh to appoint a lecturer; and though the Biſhop be to judge of his fitneſs, yet unlefs he examines the applicant and ſtates the particular grounds of unfitneſs to which he objects, fo as to give the party an opportunity of anfwering them if he can, it is impoſſible for him to be able fully to decide upon the merits of the objection. Even a Viſitor, whofe power is the greateſt which exiſts in theſe cafes, muſt hear the parties before he decides againſt them.

Lord ELLENBOROUGH C. J. This is a very delicate truſt, which the act of parliament ſeems to have veſted in the Biſhop, to be exercifed according to his diſcretion as to the fitneſs of the perfon; for it fays " that no perfon ſhall be received as a lecturer, &c. *unleſs he be firſt approved* and *thereunto licenſed* by the Archbiſhop or Biſhop, &c. Suppofe he ſhould return non idoneus, generally; can we compel him to ſtate all the particulars from whence he draws his concluſion? Is there any inſtance of a mandamus to the Ordinary to admit a candidate to holy orders, or to ſpecify the reafons why he refuſed? If indeed it had appeared that the Biſhop had exercifed his juriſdiction partially or erroneouſly; if he had aſſigned a reafon for his refuſal to licenſe, which had

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no application, and was manifestly bad, the Court would interfere: but the difficulty that I feel is, that the Bishop, as it now appears, stands only upon his objection to the fitness of this party, of which the statute meant that the Bishop should be the judge.

C. Warren referred then to 2 *Inst.* 632., where Lord *Coke*, in his comment on the statute *Articuli Cleri*, *c.* 13., treating of the ability and sufficiency of the person presented to a benefice, the examination of which it is admitted belongs to the Bishop; yet says, that in a Quare impedit brought against the Bishop for refusal of a clerk, "he must shew the cause of his refusal specially and directly; for whether the cause thereof be spiritual or temporal, the examination of the Bishop concludes not the plaintiff; to the intent the Court, being judges of the principal cause, may consult with learned men in that profession, and resolve whether the cause be just or no: or the party may deny the same; and then the Court shall write to the Metropolitan to certify the same." [*Le Blanc* J. asked if he had any case of a mandamus granted to the Bishop to licence a person whom he had rejected as unfit.] It was said by *Powell* J. in *Colefatt* v. *Newcomb* (*a*), (upon a motion for a prohibition in the case of a minister of a donative who was sued in the Ecclesiastical Court for reading parts only of the service, and for preaching without licence,) that "since the act of uniformity, if the Bishop denied to grant a licence to a parson who was fit to preach, they would issue a mandamus to him to grant one; and that by the act of uniformity the ecclesiastical jurisdiction was saved." Now here there is a plain temporal right, and the act of uniformity, which renders a

(*a*) 2 *Ld. Ray.* 1205.

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licence neceſſary to the enjoyment of it, brings the queſtion of fitneſs into judgment before this Court, in this ſhape.

Lord ELLENBOROUGH C. J. It is admitted that this is an unprecedented caſe for a mandamus; and therefore, before we put the Biſhop to the expence of anſwering this application, we will conſider whether it would be proper to grant a rule to ſhew cauſe.

On the next day his Lordſhip ſaid that the Court had determined to give a rule niſi in this caſe: but they deſired *Warren* before it came on again to look at the caſes of *The King* v. *The Biſhop of London*, 1 *Term Rep.* 331. *The King* v. *Field and Others*, 4 *Term Rep.* 125. *The King* v. *The Biſhop of Exeter*, 2 *Eaſt*, 462. and other caſes (*b*).

Monday, 6th *May*.

The caſe ſtood over till this term, and on this day *The Attorney-General*, *Dampier*, and *Abbott* were to have ſhewn cauſe againſt the rule; but Ld. *Ellenborough* C. J. ſtated a preliminary objection to this application, which had occurred to the Court in the interval, upon looking more attentively into the ſtatute of uniformity, and to which their attention was not drawn at the time when the rule was applied for. That ſtatute enacts, that no perſon ſhall be allowed to preach as a lecturer in any church, &c. "unleſs he be firſt approved and thereunto licenſed *by the Archbiſhop of the province*, OR *Biſhop of the dioceſe*, or (in caſe the ſee be void) by the guardian of the ſpiritualties," &c. And no application for a licence, his Lordſhip obſerved, appeared to have been made in this

(*a*) Vide *Rex* v. *Biſhop of Oxford*, 7 *Eaſt*, 345. and 600.

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inſtance to the Archbiſhop of the province, but only to the Biſhop of the dioceſe, by whom it had been refuſed. But non conſtat that the Archbiſhop, if applied to, might not have granted the licence, though the Biſhop did not think proper to do ſo. And as this Court would only grant a mandamus where the party entitled had no other remedy, they ought, before they entertained a motion of this kind, to be ſatisfied that he had endeavoured to procure a licence from thoſe perſons in whom the power of granting it was veſted by the eccleſiaſtical juriſdiction of the county, and to whom the legiſlature intended that the application ſhould be made.

Garrow and *C. Warren*, who were to ſupport the rule, were called upon to anſwer this preliminary objection; who ſaid that it had never before been conſidered neceſſary to make the application to both the Archbiſhop and Biſhop: nor did they underſtand whether the further application to the Archbiſhop were to be conſidered as an original application, or in the nature of an appeal to the metropolitan from the dioceſan juriſdiction. But if each had an original juriſdiction, the legiſlature muſt have meant to give the party an option of applying to either; and an application to and refuſal by one only was ſufficient to found an application for a mandamus to that one. As in the inſtance of juſtices of the peace, each of whom has an original power to do various acts confided to their judgment by ſeveral ſtatutes: but it was never conceived to be an anſwer to an application for a mandamus to the one who had refuſed the application, that the party might have applied to other juſtices having co ordinate juriſdiction to do the act required. Nor can it be expected that the Archbiſhop would, from motives of delicacy, be diſ-

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posed to grant such a licence when it had been before refused by the Bishop.

Lord Ellenborough C. J. We cannot suppose that any motive of delicacy would interfere to prevent the Archbishop from granting a licence, if upon investigating the matter he felt that it was his duty to grant it. With respect to applications to justices of the peace individually to do certain acts which magistrates of that description in general are authorized to do, the generality of the authority and the multitude of the persons invested with it may be a sufficient reason for not requiring a previous application to each, before resort is had to this Court to correct an improper refusal of either of them to act when duly called upon. But here are two persons specially designated by the legislature, who have an original jurisdiction to grant the required licence, and either of them may, in the ordinary course, give this party the benefit which he seeks. It is not enough therefore to found an application for the extraordinary interference of this Court to shew that he has applied to one of them. However, as this point may have come by surprize upon the counsel who were to support the rule, the Court will only direct it to be discharged provisionally, in case the applicant's counsel shall not, on next *Wednesday*, be prepared to support it.

But after some interval on the same day *Garrow* and *C. Warren*, who had consulted in the mean time out of court, said that the point had not altogether come upon them by surprize, though they had considered that it was governed by the instance of a mandamus issued to one justice of the peace on his single refusal to do certain acts which might be done by any magistrate of the district. That they had only to suggest this

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this further difficulty, as to whom the mandamus was to be directed, if application were made to the Archbishop as well as the Bishop; each having separate and not joint jurisdiction. But Lord *Ellenborough* C. J. said that if it were proper to grant the mandamus at all, there would be no difficulty, he conceived, as then advised, in directing it to both or one of them, (both having refused the licence) commanding them or one of them to hear, &c.

Rule discharged.

STEDMAN *against* MARTINNANT.

Tuesday, May 7th.

The plaintiff having accepted a bill payable at a future day for the accommodation of the defendant, the latter afterwards, and before the bill became due, committed an act of bankruptcy, followed by a commission, which was afterwards superseded; and time was given to the bankrupt by his creditors; and the plaintiff thereupon accepted another bill for the same debt, with the addition of interest and stamp: Held that this was a continuation of the same suretyship by the plaintiff for the defendant, which existed before the act of bankruptcy and the first commission: and a second effectual commission having afterwards issued upon the same act of bankruptcy, before the plaintiff's second acceptance became due, which was paid when due; held that the amount was proveable as a debt under such commission by virtue of the stat 49 *Geo.* 3. c 121. *s* 8, and was consequently barred as a personal demand against the bankrupt by his certificate.

THE plaintiff declared in assumpsit for money lent, paid, had and received, and on an account stated: the defendant pleaded a special plea of bankruptcy (*a*): and at the trial before Lord *Ellenborough* C. J. at the sittings in *Middlesex* after last term a verdict was found for the plaintiff for 260*l*., subject to the opinion of the Court upon the following case.

On the 5th of *January* 1807 the plaintiff, at the defendant's request and for his accommodation, accepted a bill of exchange drawn by the defendant for 234*l*. 11*s*., payable at 70 days after date; and the defendant promised to provide the plaintiff with money to pay such bill. The bill became due on the 19th of *March* 1807, and, the defendant not providing for it, was dishonoured.

(*a*) *Vide* S. C. upon this point 12 *East*, 664.

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On the 18th of the fame *March* a docket was ftruck, and on the 21ft a commiffion of bankrupt was iffued againft the defendant, which was fuperfeded on the 15th of *April*; on which day another commiffion of bankrupt was iffued againft the defendant; but neither of thefe commiffions were gazetted or proceeded upon. A meeting of the defendant's creditors was then held, and time was given him to pay his debts by inftalments. On the 9th of *June* the plaintiff accepted another bill for the like accommodation of the defendant for 237*l.* 11*s.* 10*d.*, which became due the 12th of *September*, and was on that day paid by the plaintiff for the defendant's ufe, he not providing for the fame. This latter bill was given for the purpofe of taking up the former difhonored one, with the addition of intereft and ftamp; and was indorfed by *C. Aldrich* as an additional fecurity to Meffrs. *Herries* and Co., the holders of the former bill, who had required the fame. A commiffion of bankrupt iffued againft the defendant, dated the 6th of *Auguft* 1807, founded upon an act of bankruptcy committed in the *March* preceding. Under fuch commiffion a dividend of 6*s.* 4*d.* in the pound was declared and made on the 6th of *Auguft* 1808; and a fecond dividend of 1*s.* 6*d.* in the pound was declared and made on th 28th of *July* 1809. Previous to paying the laft dividend the affignees had in hand 1549*l.* belonging to the defendant's eftate; and the plaintiff, (fuppofing him entitled to prove the money paid on the bills as a debt) and other creditors of the defendant who had not proved under the faid commiffion, might at that time have received dividends equal in proportion to their refpective debts, without difturbing any dividends then already made. The defendant obtained his certificate of conformity under the faid commiffion on the 4th of *Sep-*

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tember 1809. The queſtion was, whether the plaintiff were entitled to recover from the defendant the ſaid ſum of 260*l.* notwithſtanding his bankruptcy and certificate? If the Court were of opinion that he was entitled to recover, then the verdict was to ſtand: otherwiſe, a nonſuit was to be entered.

Puller argued for the plaintiff, that the action was maintainable, becauſe the debt owing to him as ſurety for the bankrupt upon the new bill for 237*l.* 11*s.* 10*d.* was not proveable under the commiſſion, either by the bankrupt law as it ſtood before, or ſince, the paſſing of the late ſtatute of the 49 *Geo.* 3. *c.* 121.: clearly not under the old law, becauſe the debt was not paid by the plaintiff as acceptor of the bill, and ſurety for the defendant, before the bankruptcy of the latter (*a*): nor under the new law; for though the 8th ſection of that ſtatute enacts, that where, at the time of iſſuing a commiſſion of bankrupt, any perſon ſhall be ſurety or liable for a debt of the bankrupt, it ſhall be lawful for ſuch ſurety or perſon liable, if he ſhall have paid the debt, &c. though paid after the commiſſion iſſued, and the creditor ſhall have proved his debt, to ſtand in the place of the creditor as to the dividends; and when the creditor ſhall not have proved, ſuch ſurety, &c. may prove his demand in reſpect of ſuch payment as a debt, under the commiſſion, (not diſturbing former dividends,) though ſuch perſon may have become ſurety or liable for the debt of the bankrupt *after* an act of bankruptcy: yet that is with a proviſo, *that he had not, at the time when he became ſuch ſurety or ſo liable, notice of any act of bankruptcy* by ſuch bankrupt com-

(*a*) *Chilton* v. *Whiffin and Another*, 3 *Wilſ.* 13. and *Young* v. *Hockley*, *ib.* 346.

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mitted, or that he was insolvent, or had stopped payment. And then the clause provides, "that *the issuing a commission of bankrupt*, though it shall be afterwards superseded, *shall be deemed such notice* (a)." Here, it is true, that the first bill for 234*l.* 11*s.* was accepted by the plaintiff for the accommodation of the defendant before his bankruptcy; but that bill was never paid, and consequently could not have been proved by the plaintiff as a debt under the drawer's commission; and all liability of the plaintiff upon it was discharged, not merely by the time given to the drawer, [which Lord *Ellenborough* C. J. observed would not discharge the *acceptor* (b)] but by the giving of the new bill, which was a new security, having a new party to it, namely, *Aldrich* the indorser; and not merely a new security for the same debt, but for a new and extended accommodation, which did away and absorbed the old debt. The plaintiff therefore became security for a new debt by his second acceptance, which, being after the issuing of the first superseded commission, and consequently after that which is made notice of the act of bank-

(a) The clause proceeds to enact, that every such bankrupt "who "shall obtain his certificate shall be discharged of all demands at the "suit of every such person having so paid, or being hereby enabled to "prove as aforesaid, or to stand in the place of such creditor as afore-"said, with regard to his debt, in respect of such suretyship or liability, "in like manner, to all intents and purposes as if such person had been "a creditor before the bankruptcy of the bankrupt for the whole of "the debt in respect of which he was surety or was so liable as afore-"said."

(b) Vide *Dingwall* v. *Dunster*, *Dougl.* 247. and *Ellis* v. *Galindo*, there cited. So in *Anderson* v. *Cleveland*, sittings at *Guildhall* after *Easter* 1769, in an action by the indorsee against the acceptor of a bill of exchange, no demand was proved till three months after the bill was due, and when the drawer had become insolvent. But by Ld. *Mansfield* C. J. The acceptor of a bill or maker of a note always remains liable. The acceptance is proof of having assets in his hands, and he ought never to part with them unless he be sure that the bill is paid by the drawer. MS.

ruptcy

ruptcy by the ſtatute, was not proveable under the ſubſequent commiſſion by the expreſs proviſion of the new law.

Franklin, contrà, was ſtopped by the Court.

Lord ELLENBOROUGH C. J. Here is a plaintiff who, before any act of bankruptcy or inſolvency of the defendant, accepted a bill for 234*l.* 11*s.* for his accommodation, by which he became ſurety for the defendant, and liable for his debt to that amount. Afterwards, and before the bill was due, the defendant committed an act of bankruptcy: the bill was diſhonored, but the plaintiff continued liable to the holder for the amount. A commiſſion afterwards iſſued, under which, if it had been acted upon, this debt was liable to be proved; but it was afterwards ſuperſeded, and time was given to the bankrupt; and another bill was drawn by the defendant and accepted by the plaintiff for the ſame debt, with the addition merely of intereſt and ſtamp; and afterwards an effectual commiſſion iſſued upon the original act of bankruptcy, and the plaintiff has ſince paid the bill. But the giving of the ſecond acceptance upon the new bill for the prior debt did not diſcharge the original debt for which the plaintiff had become ſurety before the act of bankruptcy; and in paying that ſecond bill, the plaintiff was only paying the ſame debt which he was liable to pay as ſurety for the defendant upon the firſt bill. Then is not this a caſe within the 8th ſection of the ſtatute referred to; by which the ſurety for a debt proveable under a commiſſion, though not paid by him till after the iſſuing of the commiſſion, ſhall ſtand in the place of the original creditor as to the whole of the debt ſo paid. The act however provides that this ſhall not extend to one who when

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he became surety had either notice in fact of the act of bankruptcy committed, or implied notice from the issuing of a commission, though such commission were afterwards superseded. But in order to affect the plaintiff's debt with such implied notice, it was necessary for him to bring down the commencement of the suretyship to a period subsequent to the issuing of such commission afterwards superseded, which he has failed to do; and therefore it stands as a debt which was proveable under the commission, and is consequently barred by the defendant's certificate.

Per Curiam, (*Le Blanc* J. absent)

Postea to the Defendant.

Tuesday, May 7th.

Parnther *against* Gaitskell.

A share in the *London* Institution, incorporated by charter for the advancement of literature, &c. cannot be transferred until the proprietor shall, *by writing under his hand*, signify his desire so to do, to the committee of managers, and mention therein *the name*, &c. and other description of the person to whom he is desirous the same should be transferred, which person is to be approved by the committee: held that a note addressed to them in these words; "Having disposed of my "share in the *London* Institution to [leaving a blank for the name], I beg leave to recom-"mend him to be elected in my place, as a proprietor," &c. and signed by the proprietor: which note was left in the hands of an agent, (the clerk of the society,) for the purpose of selling the share; did not authorize such agent to fill up the blank himself with the name of the purchaser with whom he contracted for the price, against the rules of the society, which require the recommendation of the candidate to be vouched by the proprietor himself, inserting his name, &c. in the paper: and consequently the agent had no authority, before the transfer was so completed, to receive the money of the purchaser and to insert his name in the blank unknown to the proprietor: and such purchaser paying the money before the time of payment when the transfer from the proprietor was complete, pays it at his own risk to the agent, whom he thereby makes his own for that purpose. And such agent afterwards absconding with the money, and the society disallowing the transfer upon the interference of the proprietor; held that the purchaser could not recover the amount from such proprietor in an action for money had and received.

In assumpsit for money had and received, &c. and for money paid, &c. to which the general issue was pleaded; a verdict for the plaintiff for 80*l*. was taken at the trial before Lord *Ellenborough* C. J. at *Guildhall*, subject to the opinion of the Court on the following case.

By

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PARNTHER *against* GAITSKELL.

By the charter of incorporation of "The *London* Institution for the advancement of literature and diffusion of useful knowledge," the following regulation is prescribed, as to the mode of transferring shares therein. "And we will, constitute, and grant, that if any pro-" prietor shall be desirous of transferring his share in the "institution, such proprietor shall *by writing under his* "*hand* signify the same to the committee of managers, "and mention therein *the name*, residence, and other de-" scription of the person to whom he is desirous the same "should be transferred; and such person (unless he be "the legitimate son of such proprietor, in which case he "shall be admitted without delay) shall be ballotted for "at the next meeting of managers; and if such person "shall be approved of by two-thirds of the managers "present, the said share shall be thereupon immediately "vested in that person; but if he shall not be approved "of, the proprietor desirous of parting with the same "shall be entitled at his option either to propose another "person for admission, or to claim from the funds of the "institution such a sum of money as shall then be fixed "by the by-laws of the said institution for the qualifica-" tion of a proprietor: and so toties quoties as such no-" mination shall be made, and the nominee rejected at a "ballot." The defendant being a proprietor of a share in the said Institution, his brother *Henry Gaitskell*, by the defendant's direction, on the 1st of *Sept.* 1809 put into the hands of *James Savage* (who was then a clerk in the Institution) a note or memorandum in the following words: — "Gentlemen, Having disposed of my share in "the *London* Institution to [here, a blank was left for the "name] I beg leave to recommend him to be elected in

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" my place as a proprietor of the ſaid Inſtitution. I am, " Gentlemen, your obedient ſervant, *Thos. Gaitſkell.*"

The plaintiff, wiſhing to purchaſe a ſhare in the ſaid Inſtitution, and having been informed that *Savage* had ſeveral in his hands for ſale, went on the 3d of *October* following to *Savage*, when the price to be paid by the plaintiff was ſettled at 80*l.* for the ſaid ſhare; and the plaintiff then paid that ſum to *Savage*, who at the ſame time filled up the blank in the ſaid letter with the plaintiff's name. *Savage* was in the habit of being employed in the ſale and transfer of ſhares in the Inſtitution, and acted as agent between vendor and vendee, and was ſo employed on this occaſion; but *Savage* never ſaw the defendant on the ſubject but once, and that was whilſt the letter of recommendation was in *Savage*'s hands, and before the plaintiff's application to purchaſe; and he then aſked *Savage*, " If his ſhare was transferred;" to which *Savage* anſwered, " No." The recommendation, after it was filled up, remained in the poſſeſſion of *Savage*; but he neither preſented it to the committee, nor did he ever pay over the 80*l.* to the defendant, nor informed him of any thing that had paſſed between the plaintiff and him, but abſconded with the money. On the 3d of *February* 1810, after *Savage* had abſconded, and before the defendant had any information of any thing which had paſſed between the plaintiff and *Savage*, the defendant by his agents wrote the following letter to the managers of the Inſtitution. " *February* 3, 1810. " Gentlemen:—On behalf of Mr. *Thomas Gaitſkell*, we " beg leave to inform you, that he hereby revokes all " power or authority for the transfer of his ſhare in the " *London* Inſtitution; he neither having received the

" purchaſe-

"purchase-money, or had the name of any person sub-"mitted to him as the intended purchaser thereof. At "present it is Mr. *Gaitskell's* intention to remain a pro-"prietor, and he presumes if any notice or proposal for "a transfer should be made, that you will not accept or "receive the same after this intimation. We are, &c. "*Gregson* and *Dixon*." The plaintiff also applied to the managers for their interference respecting the said share; but in consequence of the said letter of the defendant's agents, the managers refused to interfere, and so informed both parties; and in consequence of the premises, the plaintiff has not been admitted a proprietor of the said Institution, nor has *Savage* or the defendant repaid the said 80*l.* to the plaintiff. If the plaintiff were entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

Parnther, for the plaintiff, contended, that the defendant's note of the 1st of *September* to the committee, which was put into the hands of *Savage* for the purpose of selling the share, gave him authority to complete the transfer to a purchaser so far as depended upon the act of the defendant, and consequently to receive the purchase-money. The blank for the name of the purchaser was left, because *Savage* the agent was to find one, and not because the defendant meant to reserve to himself the filling up the name when known, and concluding the transfer himself: if that had been intended, he would not have signed the authority in the first instance. Where an agent is authorized to do an act for his principal, as in this case to sell, without any restriction upon his agency, he may do it in any manner which is reasonable and fit for the purpose; and the Courts have been

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uniform in extending the liability of principals for their agents while acting within the general scope of their authority, as to the means pursued by them for its accomplishment, if such means were not specially prohibited. This principle was fully established in the case of *Fenn* v. *Harrison and Others* (a), where the defendants, bill-holders, being desirous of getting a bill discounted, put it into the hands of an agent for that purpose without indorsing it, and as it appeared at first with a refusal to indorse it; and therefore they were held not to be liable for the act of their agent in procuring it to be indorsed by another person, upon the supposed indemnity of the defendants, who were not privy to such procuration, by reason of the limited authority of the agent; though it appeared that he could not otherwise have got the bill discounted. But when upon a subsequent trial the evidence was, that the defendants had desired their agent, generally, to get the bill discounted, without negativing their indorsement of it; the act of their agent in procuring such indorsement was held to be binding upon the principals, and to be a good consideration for their promise to pay the amount to the plaintiffs, who had discounted it in consequence of the indorsement so procured. Now here the paper was put into the hands of the agent *Savage* for the purpose of sale generally, without any restriction upon his agency: while it remained in his hands, the defendant asked him, "if his share was *transferred?*" which shewed that the defendant had put the paper into his hands for the purpose of transferring the share, especially when coupled with the defendant's signature. [Lord *Ellenborough* C. J. Does not the

(a) 3 *Term Rep.* 757. and 4 *Term Rep.* 177.

power

power of transfer depend alfo upon the regulations of the fociety; one of which is, that the proprietor, defirous of transferring his fhare, fhall fignify the fame to the committee *by writing under his hand*, mentioning *the name*, &c. of the transferree? But here the defendant never inferted the name of the transferree under his own handwriting as required.] It is not neceffary that the name of the transferree fhould be written by the very hand of the proprietor: he might not be able to write, or might be under a temporary difability; and there can be no fraud in fuch a cafe, becaufe the committee are to approve the perfon propofed. [Lord *Ellenborough* C. J. The object of the regulation was, that the committee fhould have an authentic voucher of the recommendation of the proprietor, as well as exercife their own judgment on the perfon recommended. If one who could not write employed another as his general agent to write for him, that might anfwer the purpofe; but *Savage* did not ftand in this relation to the defendant. He was a fpecial agent; and the voucher was given to him in blank, and his filling it up with his own nominee was a fraud upon the fociety, who had not thereby the intended fecurity for the propriety of the recommendation.] Whatever deceit was practifed, the defendant was the moving caufe of it. By putting the blank voucher, with his fignature to it, in the hand of his agent, he held out to third perfons, that that agent had a general authority to fell the fhare to any perfon who would contract with him; and by this the plaintiff was induced to pay his money to that agent: the fale for ready money was for the benefit of the principal. [*Bayley* J. The rule is, that if a purchafer pay his money to the agent of the vendor before the time when the latter is authorized to receive it, he makes that

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that agent his own for the purpose of paying over the money to the right owner.

Nolan, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. Every person who pays money beforehand pays it at his own risk. The agent could not have claimed the money before it was due to the principal; and till the blank was filled up by the principal, he could not claim the money, and the agent had no authority to receive it. The regulation is for the security of the society; but it also operates for the security of the principal himself, that the money should not be paid to his agent till the blank has been filled up by himself. He may chuse to reserve that in his own hands, after a purchaser has been found by his agent whom he himself approves. It is not even stated that *Savage*, though commonly acting as agent between vendor and vendee on these occasions, usually received the purchase-money, or had done so on any former occasion. In this instance the money appears to have been paid by the plaintiff upon his own confidence in the agent employed; and having trusted him, without any fault in the defendant to induce that confidence, he must stand to the loss, and is not entitled to recover it against the defendant.

GROSE J. assented.

BAYLEY J. (a) There is no doubt in this case. It may be admitted that *Savage* would have had authority

(a) *Le Blanc* J. was indisposed and absent.

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to receive the purchase-money when the transfer was complete, which is admitting a great deal for the plaintiff: but still the question is, whether *Savage* were authorized to receive it at the time when the plaintiff paid it to him. If goods are to be paid for on delivery, and the vendee will pay for them to one who acts as agent on behalf of the vendor, before they can be delivered, he thereby constitutes that person his own agent until the time when the money ought to have been paid to him, and must stand to the loss if it be misapplied. Now here the time for payment was not arrived when the money was paid to *Savage*; for a blank was left for the name when the paper was delivered to *Savage*, and by the regulations of the Institution, the proprietor is to insert the name of his own nominee; but the plaintiff paid the money to *Savage* upon his filling up the blank with the plaintiff's name: he therefore paid it at his own risk.

Postea to the Defendant.

WILLIAMS, one, &c. *against* JONES.

Tuesday, May 7th.

Though the cause of action accrued within the jurisdiction of the Supreme Court at *Calcutta*, while both the parties were resident there; and by the king's charter, granted in pursuance of the stat. 13 *G.* 3. *c.* 63. that Court is authorized to exercise the same jurisdiction in civil cases as is exercised by the Court of *K. B.* within *England by the common law thereof*: and assuming that by such authority the provisions of the statutes of limitation 21 *J.* 1. *c.* 16. *s.* 7. and 4 *Ann.* *c.* 16. *s.* 19. are transferred to *India* as part of the law of *England*, auxiliary to the common law; yet by the express terms of the savings in those statutes, as applicable to the Courts here, the plaintiff's right of action upon an assumpsit is saved, if he (having returned home before the defendant) commence such action within six years after the defendant's return home, though more than six years had elapsed in *India* after the cause of action accrued there, and during the defendant's stay within the jurisdiction of the Court in that country.

THE plaintiff declared in assumpsit for so much money laid out and expended by him at the request of the defendant, as his attorney and solicitor, and on his retainer, in prosecuting and defending suits *in the supreme*

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court of judicature at Fort William *in* Bengal, *and in other courts in parts beyond the seas, in the* East Indies, and also in other his majesty's courts at *Westminster*, and for his fees, work and labour, &c.; and also upon the common counts. To which the defendant pleaded non assumpsit; and the statute of limitations, that the causes of action stated did not accrue within six years next before the exhibiting of the plaintiff's bill. To which last plea the plaintiff replied, that the defendant, before and at the time when the said causes of action mentioned in the declaration first accrued to the plaintiff, was beyond the seas, to wit, in the *East Indies*; and that the defendant afterwards, on the 1st of *January* 1809, returned from beyond the seas into this kingdom, which said return of the defendant was his first return into this kingdom from beyond the seas after the said causes of action accrued; and that the plaintiff commenced this suit against the defendant within six years after the defendant's first return into this kingdom from beyond the seas since the accruing of the said causes of action. The defendant rejoined, that after the passing of the act of the 13 *Geo.* 3. *c.* 63. (which is the act for regulating and establishing the courts of judicature in the *East Indies*,) the king, pursuant to the powers and authorities thereby given to him, by his letters patent under the great seal of *Great Britain*, made at *Westminster* on the 26th of *March*, in the 14th year of his reign, granted and appointed that there should be within the factory of *Fort William* at *Calcutta* in *Bengal*, a court of record, which should be called the Supreme Court of Judicature at *Fort William* in *Bengal*; and did thereby constitute the said Supreme Court of Judicature to be a court of record; and that such court should consist of a chief justice and three puisne justices, &c. who should

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ſhould have *ſuch juriſdiction and authority as our ſaid lord the king's juſtices of his court of K. B. had or might lawfully exerciſe within the ſaid part of* Great Britain *called* England, *by the common law thereof.* That the king thereby conſtituted certain perſons therein named the firſt chief and puiſne judges of the ſaid Court; and by the ſaid letters patent ordained and appointed that the ſaid Supreme Court ſhould have juriſdiction to hear, examine, try, and determine all actions and ſuits which ſhould ariſe concerning any treſpaſſes, &c. debts, demands, &c. or other things real or perſonal in the ſeveral provinces of *Bengal, Bahar,* and *Oriſſa,* &c. and all pleas real, perſonal, or mixed, which ſhould ariſe againſt the *Eaſt India* Company, and againſt the mayor and aldermen of *Calcutta, and againſt any other of the king's ſubjects who ſhould be reſident within the ſaid provinces, or who ſhould have reſided there, or who ſhould have any debts, effects, or eſtate, real or perſonal, within the ſame;* prout patet, &c. Which ſaid letters patent afterwards, and before the making of the defendant's promiſes, to wit, on the 1ſt of *September,* 14 *Geo.* 3. were openly publiſhed at *Fort William* in *Bengal.* The defendant then averred, that before, and at, and long after the making of the promiſes in the declaration mentioned, *the defendant and the plaintiff were ſubjects of the king, and were reſiding at* Bengal *aforeſaid, within the juriſdiction of the ſaid Supreme Court; and that the ſaid ſeveral promiſes were wholly made, and the ſaid ſeveral cauſes of action wholly accrued to the plaintiff at* Bengal *aforeſaid, and within the ſaid juriſdiction; and that the defendant continued reſident at* Bengal *aforeſaid, and within the juriſdiction of the ſaid Supreme Court, for more than ſix years* after the making of the ſaid ſeveral promiſes; and that no ſuit or action was com-

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menced by the plaintiff againſt him upon the ſaid promiſes at any time within ſix years next after the making of the ſame; nor did the defendant promiſe, in manner and form as the plaintiff has complained againſt him, at any time within ſix years next before he quitted *Bengal* aforeſaid, &c. To this the plaintiff demurred generally.

Tindal, for the plaintiff, ſtated the caſe to be ſhortly this; that the plaintiff and defendant, being within the juriſdiction of the Supreme Court at *Bengal*, the cauſe of action accrued: that the plaintiff ſoon after returned home, but the defendant continued in *India* for more than ſix years, and then returned home; and that this action having been commenced within ſix years after the defendant's return, the queſtion was, whether the plaintiff's remedy were barred here by the ſtatute of limitations. But firſt, he contended, that neither by the charter referred to, nor by act of parliament, was the ſtatute of limitations made part of the law of *India*. But if it were, then he contended, ſecondly, that the courts here having co-ordinate authority with thoſe in *India*, and the caſe falling within one of the exceptions in the ſtatute, the plaintiff's remedy here was not barred. Firſt, the only juriſdiction given by the charter to the Supreme Court is ſuch as this court may exerciſe in *England by the common law thereof*, which therefore does not include the *ſtatute* law. And this is the more obſervable, becauſe in other parts of the charter the ſame juriſdiction is given to the Supreme Court as is exerciſed by the courts of admiralty, and the courts of oyer and terminer in *England* (*a*); which doubtleſs would include

(*a*) Ld. *Ellenborough* C. J. aſked how the Court were to take judicial cognizance of any parts of the charter which were not ſet out in the pleadings;

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include all powers exercifed by the ftatute law in admiralty and criminal proceedings before thofe refpective courts here: but the civil jurifdiction is only given to be exercifed according to the common law. This is confirmed by the fpecial provifion of the ft. 26 *Geo.* 3. *c.* 57. *f.* 32., which enables penalties given by ftatutes for offences committed againft the exclufive trade of the company in the *Eaft Indies* to be recovered in the courts there, in like manner as in the courts of *Weftminfter*; which provifion would not have been neceffary if the Supreme Court had before had jurifdiction of all civil rights by the ftatute as well as by the common law. [Lord *Ellenborough* C. J. Thofe acts had probably confined the fuing for the penalties to be in the courts of *Weftminfter*.] At all events it is clear that the jurifdiction of the courts in *India* does not embrace the whole body of the *Britifh* ftatute law; and if not, it refts upon the party fetting up fuch jurifdiction in bar to the action, to fhew the diftinction between thofe ftatutes which are and thofe which are not adopted, and that the ftatute of limitations falls within the adopted clafs. The bankrupt laws do not extend to *India* (*a*), nor the infolvent debtors' acts, nor the laws of cofts, &c. [Lord *Ellenborough* C. J. Suppofing the law of limitations of actions were admitted to attach there, fo as to have barred the plaintiff's remedy

(*a*) *Ex parte Williamfon*, 1 *Atk.* 82., was referred to, fhewing that they did not extend to *Ireland*, while under the legiflative fupremacy of this country, as a feparate kingdom.

ings; to which it was firft anfwered by the plaintiff's counfel, that the act of parliament 13 *G.* 3. *c.* 63. authorizing the charter, the provifions of the latter muft be taken to be incorporated into the act: but the defendant's counfel afterwards faid that he was not aware that there were any parts of the charter material to the argument which were not fet out.

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medy in the Supreme Court in *India*, if he had fued the defendant there, does it follow as a confequence that his right of action would now be concluded here?] The ftatutes of limitations cannot by the very terms of them apply to *India*; for if the enacting part be transferred thither, the exceptions muft go too; one of which, that of being *beyond the feas*, occurring both in the ftat. 21 *Jac.* 1. *c.* 16. *f.* 7. and in the 4 *Ann. c.* 16. *f.* 19. means the four feas out of *England*, (or of *Great Britain* after the union with *Scotland*,) according to the explanation given in the notes to *Co. Lit.* 109. *a.* and *b.* where all the authorities are collected, and in *King* v. *Walker*(*a*). But, 2dly, if the ftatute of limitations extend to *India* without that exception, or with a different fenfe put upon it, at any rate the charter would only give the Supreme Court a concurrent jurifdiction with the courts here; and there are no words in the charter, or in the act of parliament authorizing it, which exclude the jurifdiction of this court; and without exprefs words or neceffary implication it cannot be excluded (*b*). The ftatute of limitations only attaches to bar the remedy where the plaintiff might have fued in the courts here within fix years before, and omitted fo to do. Neither does the new judicature in *India* give the plaintiff the fame remedy there which he is entitled to here as a *Britifh* fubject; for though the courts there be founded upon the common law of *England*, yet they differ in feveral material refpects: they do not decide by juries in civil cafes; they proceed upon depofitions; they are required to give judgment according to juftice and right, which does not neceffarily confine them to the municipal laws

(*a*) 1 *Lev. Rep.* 286. (*b*) *Cates* v. *Knight*, 3 *Term Rep.* 442.

of this country: and if this defence were admitted, it would extend to the case of every colony of this country where the common law of *England* is adopted as the basis of the colonial code. And it would be difficult to draw the line even there, and to shew that the same consequence would not follow, if the parties were in any foreign country where the plaintiff might have sued within six years before the action brought here.

Peake, contrà, contended, that by the charter constituting the Supreme Court at *Fort William* in *Bengal*, the benefit of the law of *England* was given to *British* subjects resident within its jurisdiction; one of the provisions of which law is, that no man shall be charged in a personal action on a contract, unless commenced within six years from the cause of action arising. The jurisdiction of the Court is not founded merely upon the charter, but upon the act of the 13 *Geo.* 3. *c.* 63. enabling the king to grant it. All the provisions both of the act and of the charter are conformable to the law of *England*. By *s.* 13. the supreme court to be erected under the charter "shall have and is *declared* to have full power and authority to exercise and perform *all civil*, criminal, admiralty, and ecclesiastical jurisdiction," &c. "and to do all such *other* things as shall be found necessary for the administration of justice, and the due execution of all or any of the powers which by the said charter shall be granted to the said court." It is thereby also made a *court of record*, and a court of oyer and terminer and gaol delivery. Its jurisdiction (by *s.* 14.) is to extend to *all British subjects* residing in *Bengal*, *Bahar*, and *Orissa*. It is stated indeed by the charter that the Court is to exercise such jurisdiction as the Court of K. B. here does

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in *England, by the common law thereof;* but that is merely named in contradistinction to the *admiralty* and *ecclesiastical* jurisdiction also conferred upon it, and not in exclusion of the statute law, which is grafted upon the common law and governed by the same rules and principles of construction. The rule of the common law being given, it must be given with all the modifications, additions, and restrictions which have from time to time been engrafted upon and consolidated with it by the statute law since time of legal memory, as accessaries to the principal; so far at least as this body of laws is applicable to a foreign country: amongst these the statutes of limitation are interwoven with and now form part of the right of action and defence given to *British* subjects. In the argument of *Blankard* v. *Galdy* (*a*), *Pemberton* said that the statute of limitations extended to *Jamaica* (*b*), which was not denied. He referred also to 2 *Pr. Wms.* 75, 6. and *Campbell* v. *Hall*, *Cowp.* 204. [Lord *Ellenborough* C. J. Can a disability to sue in the courts here grow out of any charter? By the statute of limitations the party cannot sue after the six years from the cause of action, but there is a reservation of his right if the defendant were beyond seas during that period. How then can the king by his charter carry the disability further, and abrogate the reservation with respect to the courts here?] The object was to extend the benefit of our laws to the *British* subjects in *India*. [Lord *Ellenborough* C. J. It may have that effect while those subjects remain in *India*; but how can

(*a*) 4 *Mod.* 215. 222. S. C. 2 *Salk.* 411.

(*b*) This and other colonies have legislatures of their own, by which laws have been from time to time made, adopting certain statutable regulations of the parent state. In the principal case cited the statute of the 5 & 6 *Ed.* 6. *c.* 16. against the sale of offices, was held not to extend to that colony.

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any reſtriction attach upon them here by virtue of the charter? *Bayley* J. It does not appear that the plaintiff continued in *India* during the ſix years; and can the diſability by the charter attach upon him here, in conſequence of its operation in *India* after he had returned from thence?] If the defendant were once diſcharged by the law of *England* as extended to and exerciſed in *India*, the debt could not revive anew againſt him upon his return to this country. It is material in this caſe that the debt aroſe in *India*, and therefore the caſe is diſtinguiſhable from *Strithorſt* v. *Græme* (*a*), and other caſes, where the contract may be taken to have ariſen here. The general rule is, that all contracts muſt be governed by the law of the country where they are made; and if any thing happen by which the party bound, continuing under that law, is diſcharged, he cannot afterwards be again liable by coming here. As in *Burrows* v. *Jemimo* (*b*), where the acceptor of a bill of exchange at *Legborn*, being ſued here, brought his bill to be relieved, on the ground that he was diſcharged by the law of *Legborn*, by reaſon of the inſolvency of the drawer, and the want of aſſets when he accepted the bill. And on that ground Lord Chancellor *King* held it to be a diſcharge here; and mentioned the caſe of *Hutchinſon* (*c*), who having killed a perſon in *Spain*, and been tried and acquitted of murder there, ſuch acquittal was held pleadable in bar of an indictment for murder here. So where in *Ballantine* v. *Goulding* (*d*) a debt was contracted in *Ireland*, a diſcharge under a commiſſion of bankrupt there was held to be a diſcharge here; and the ſame rule pre-

(*a*) 2 *Blac. Rep.* 723. and 2 *Wilſ.* 145.
(*b*) 2 *Stra.* 733.
(*c*) Vide 1 *Show.* 6.
(*d*) *Co. B. L.* 515.

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vailed in *Potter* v. *Brown*,(*a*), upon a difcharge of the drawer of a bill there who had become bankrupt by the law of the ftate where the parties then refided; although the bill was drawn upon a perfon here who had refufed to accept it. [Lord *Ellenborough* C. J. Suppofe thofe parties had contracted in a foreign country, where the remedy was barred if not purfued within *three* years; and they had returned here after the three but before fix years had elapfed, could the bar by the law of that country be pleaded to an action here?] According to the principle of the cafes, the lapfe of three years would be a bar in that cafe. In *Green* v. *Revelt* (*b*) the ftatute of limitations is faid to be a beneficial law, on which the fecurity of all men depends, and is therefore to be favoured; and fo it was in *Hall* v. *Wafhourn* (*c*). And there is the more reafon for extending the protection of it to this cafe, where the plaintiff has all the time had the benefit of the fame law exercifed by a court of co-ordinate jurifdiction. If this defence do not avail, the confequences will be very oppreffive. The contract was made in *India*, where all the witneffes to it alfo refide; and it would be moft grievous to the *Britifh* fubjects there, if after having fpent the greater part of their lives there, and been protected by the fame law of limitations which prevails here, they were liable afrefh upon their return home to anfwer upon every contract they had entered into during that time, from which they had been long before difcharged by mere lapfe of time.

(*a*) 5 *Eaft*, 124. There is an error in the marginal note of that cafe, at the beginning of it *plaintiff* is put for *defendant*, and *defendant* for *plaintiff*.

(*b*) 2 *Salk*. 421. (*c*) Vide 1 *Salk*. 420. *Carth*. 136. 1 *Show*. 98.

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Tindal, in reply, ſaid that the inconveniences of the one conſtruction might fairly be balanced by thoſe of the other. If the witneſs to a contract in *India* returned to this country, the plaintiff would have no power to take his depoſition here in order to tranſmit it to *India* for the purpoſe of ſuit there, and conſequently he would be without remedy: whereas there is a power to take the depoſitions of witneſſes in *India* for the purpoſe of ſuit here. In *Burrows* v. *Jemimo* (*a*), and the other caſes of foreign bankruptcies, the *debts* were *extinguiſhed* by the laws of the foreign ſtate upon making diſtribution of the bankrupt's effects amongſt the creditors as far as the aſſets went; but the ſtatute of limitations only bars the *remedy*, and not the *debt*. The queſtion comes ſhortly to this; where a ſtatute has allowed a plaintiff to ſue a defendant coming here, however long he may have been abroad, upon a contract made there; can that right be defeated by the defendant's having remained in *India* for more than ſix years after the contract made?

Lord ELLENBOROUGH C. J. The queſtion is, how ſtands the plaintiff's right of action in the courts here under the law of *England?* Is he bound by having contracted in *India*, and by the defendant's having continued within the juriſdiction of the court there for ſix years without being ſued: and is the plaintiff here ouſted by the charter giving juriſdiction to the courts in *India* of his right of action, which is ſaved to him by the ſtatutes of *James* and *Anne?* At common law he might have ſued at any time: but the ſtat. 21 *Jac.* 1. (*c.* 16. *ſ.* 7.) takes away the right of ſuit in this caſe after a lapſe of ſix years;

(*a*) 2 *Stra.* 733.

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ſaving to the plaintiff his action if he were beyond the ſeas at the time when his cauſe of action accrued, if he bring it within the time limited after his return from beyond the ſeas; and the ſtat. 4 *Ann.* (*c.* 16. *ſ.* 19.) contains a ſimilar proviſion in caſe the defendant ſhall be beyond the ſeas at the time of the cauſe of action accruing, that then the plaintiff ſhall be at liberty to bring his action againſt ſuch perſon "after his return from beyond the "ſeas," ſo as the plaintiff takes his remedy after the defendant's return from beyond the ſeas within the time limited. If therefore the action be commenced within ſix years after the return of either party, the right of ſuit is ſaved by theſe ſtatutes. How then is the plaintiff to be deveſted of this right by a charter which the king was empowered by ſtatute to grant for the purpoſe of erecting courts of judicature in *India?* Aſſuming that the charter has given to thoſe courts a juriſdiction analogous to that which is exerciſed by this Court, and that they have adopted the ſtatutes of limitations; ſtill thoſe ſtatutes could only have the effect of barring the remedy in thoſe courts in the caſes provided for there; but they do not extinguiſh the right; for if ſo, the remedy could not be revived by a ſubſequent promiſe. But what is there to bar the remedy here, where the ſame law which is ſet up againſt him expreſsly ſaves the plaintiff's right of ſuit? It is ſaid that parties who have contracted abroad return to this country with the ſame rights only which they had in the country where they ſo contracted; and, generally ſpeaking, that is ſo: that is, if the *rights* of the contracting parties be extinguiſhed by the foreign law upon the happening of certain events: but here there is only an extinction of the remedy in the foreign court, according to the law ſtated to be received there, but no extinction

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of the right: and there is no law or authority for ſaying that where there is an extinction of the remedy only in the foreign court, that ſhall operate by comity as an extinction of the remedy here alſo. If it go to an extinguiſhment of the right itſelf, the caſe may be different. Here then the plaintiff, having once an unlimited right of ſuit till reſtrained by the ſtatutes of limitations, which ſtill ſave the right in certain caſes; we muſt look into thoſe ſtatutes to ſee whether this caſe comes within that reſtriction; and as we find that it is expreſsly within one of the ſavings, we muſt pronounce that the action is maintainable.

GROSE J. There is nothing in our law which has extinguiſhed this debt; and nothing is ſtated to ſhew that it is extinguiſhed by the law of the country where it was contracted, and where the parties reſided at the time. Then if not extinguiſhed, the plaintiff may ſue for it here, unleſs his remedy be barred by the ſtatute of limitations; but as the defendant is ſhewn to have reſided beyond ſeas till within the laſt ſix years, the caſe is expreſsly brought within one of the exceptions in the ſtatute.

BAYLEY J. (*a*) The ſtatute of limitations only bars the plaintiff's remedy and not the debt, and the extent of the defendant's argument is only to ſhew that the remedy is barred in *India*; but that does not ſhew it to be barred here. The hardſhip of ſuch a caſe is urged: but it does not appear that the plaintiff was reſident in *India* the whole of the ſix years; and then the queſtion would be, whether, in conſequence of the defendant's having remained there during that period, the plaintiff ſhall be

(*a*) *Le Blanc* J. was indiſpoſed and abſent.

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barred of his remedy, because if he also had continued there and had afterwards sued in the court at *Calcutta*, he would have been barred of his remedy by the plea of the statute of limitations. The argument of inconvenience also urged has been well answered by shewing the greater facility of obtaining evidence of the contract to be used here by means of depositions taken in *India*, than in the alternative case. Upon the reason also of the thing, upon which the statute proceeded; the presumption of payment by lapse of time is not so strong where one of the parties was in *India* during the time, as where both of them are here. But it is sufficient to say, that the defendant has not brought himself within the protection of the statute barring the plaintiff's remedy here, by reason of the exception of the defendant's being beyond seas during the time.

Judgment for the Plaintiff.

Wednesday, May 8th.

The KING *against* The Inhabitants of SMARDEN.

An apprentice, after serving out most of his time with his master in *S.*, obtained a subsequent settlement in *H.*, by serving another master there for 40 days by the direction of his first master, who was to receive 3*s.* a-week from the second master for such service: and being then dismissed by the second master, the apprentice, unknown to the first master, and without any intention of returning into his service again, lodged for one night in the same parish of *S.*, and then went into a third parish, and worked for himself for a month, when, his term being expired, he returned to *S.*, and went with his original master to a common friend, with whom the indenture had been deposited, to take it up; which he did, and carried it away. Held that the settlement was not brought back to *S.* by such *casual* lodging of the apprentice one night in the same parish of his master, without any resumption of, or even intention to resume, the service with the first master under the indenture.

TWO justices by their order removed *Richard Gilbert*, his wife and children, from *Great Chart* to *Smarden*, in the county of *Kent*; which order was confirmed on appeal to the sessions, subject to the opinion of this Court upon the following case:

On the 28th of *November* 1795, the pauper *Richard*

Gilbert

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Gilbert was bound by indenture to *J. Gurr*, of *Smarden*, ſhoemaker, to ſerve him as an apprentice for ſeven years. Only one deed was executed, which by common conſent was depoſited in the hands of a Mr. *Large*, to be retained by him for the uſe and benefit of both parties until the expiration of the ſervice. The pauper lived with and ſerved his maſter at *Smarden* till within four months of the expiration of the term for which he was bound, when his maſter made an agreement with one *Olloway*, of the pariſh of *Hedcom*, ſhoemaker, that the pauper ſhould go to work for him (*Olloway*) at *Hedcom* during the remainder of his apprenticeſhip. *Olloway* was to board and lodge the pauper, and to pay *Gurr*, the original maſter, 3*s.* weekly for the ſervices of the pauper. This agreement was made entirely by *Gurr*, without conſulting *Gilbert* the apprentice; and of the weekly ſtipend no part was reſerved for the benefit of the apprentice. The pauper accordingly went to work, and continued with *Olloway* in *Hedcom* till within three weeks of the end of his apprenticeſhip; boarding and ſleeping at *Holloway's* houſe in *Hedcom* during the whole of the time. At this period, as the pauper was told by *Olloway*, the pariſh officer of *Hedcom* called on *Olloway*, and in conſequence of a converſation between the officer and *Olloway*, which was not heard by the pauper, *Olloway* told the pauper, that he did not wiſh to affront the pariſh, and that he (the pauper) muſt therefore leave him and ſeek work elſewhere. The pauper left *Olloway* on that day, and went to *Smarden*, where he ſlept, but did not return to his maſter *Gurr*, nor had he any intention of doing ſo, as his maſter had not uſed him well, and he knew *Gurr* had no work to employ him upon. *Gurr* did not ſee the pauper on the night of his ſleeping at *Smarden*, nor

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did it appear that he was acquainted with the circumſtance of the pauper being there. The pauper went the following day to *Great Chart*, where he continued to work for his own maintenance until the expiration of the term of his apprenticeſhip; when that day arrived, he returned to *Smarden*, and his maſter and he went together to the perſon in whoſe hands the indenture of apprenticeſhip was by their joint conſent depoſited, and from that perſon, with the maſter's conſent, he received the indenture and took it away.

Gurney and *Adolphus*, in ſupport of the order of ſeſſions, contended, that the apprentice returning from *Hedcom* to *Smarden*, and ſleeping there one night where he had been before ſettled by ſerving his original maſter there for above 40 days, and where that maſter ſtill continued to live, and which was the proper home of the apprentice, brought back the ſettlement from *Hedcom* to *Smarden*, by the current of authorities upon this point. [Lord *Ellenborough* C. J. Muſt you not firſt ſhew, that his return to *Smarden* was in his character of apprentice? For he neither went to his maſter's houſe; nor does it appear that his maſter even knew of his being there.] The apprentice ſtill continued in his maſter's ſervice when he returned to *Smarden*; for up to that time he was earning wages for his maſter. Then being in his maſter's ſervice, the fact of his ſleeeping in the ſame pariſh, in which he had before ſerved him for more than 40 days, is ſufficient, according to the general doctrine recognized in *The King* v. *Brighton* (*a*); and the want of knowledge of the fact by the maſter cannot

(*a*) 5 *Term Rep.* 188.

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make any difference. The cases (*a*), where the apprentice's return into the parish of the original master has been held not to bring back the settlement, went on the ground that the relation of master and servant had in fact been abandoned, and that it was not a return into the service of the master: but here there had been no abandonment in fact of such relation, and both parties subsequently recognized its continuance at that time by joining together, at the expiration of the apprenticeship, to take the indenture out of the hands of their common trustee with whom it had been deposited. [Lord *Ellenborough* C. J. Such recognition of the master would apply as well to the service of the apprentice with *Olloway* in *Hedcom*. But is there any case where the mere fact of the apprentice returning into his master's parish, and sleeping there unknown to his master, without either returning in fact into his master's service, or even having any intention to do so, but on the contrary where it is found that he had no such intention, has been coupled on with a former service in the same parish, so as to get rid of an intervening settlement acquired in another parish?] It being admitted that there was no such case,

Taddy and *Bolland*, contrà, were stopped by the Court.

Lord ELLENBOROUGH C. J. This is the case of an apprentice bound for seven years, who, having served out all but four months of his time with his master in the parish of *Smarden*, was let out to work for another person in *Hedcom* by his original master, who

(*a*) Vide *Rex* v. *Topsham*, 7 *East*, 466.

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was to receive 3*s.* a-week for his ſervice from ſuch new maſter for the time he worked there with him. Having reſided in *Hedcom* for three months with the ſecond maſter, he was diſmiſſed by the interference of the pariſh officer; whereupon the apprentice returned to *Smarden* for one night, but not to his firſt maſter, nor into his ſervice, nor having any intention ſo to do, but merely to get a bed there, as he would have done any where elſe. Then can this be called a returning into the ſervice of the firſt maſter, who was even ignorant of the fact of the pauper's being there? But it is ſaid that the maſter afterwards recognized the continuance of the relation between them at that time, by going with the pauper, when the term of apprenticeſhip expired, to take up the indenture: but how can that vary the queſtion whether the pauper returned into his ſervice on the night when he ſlept in *Smarden*, againſt the concluſion to be drawn from all the other facts of the caſe? There being then no reſidence of the pauper in *Smarden* under the indenture for any part of the laſt 40 days of the apprenticeſhip, except by coupling the night when he ſlept there on his return from *Hedcom* with his previous reſidence in *Smarden*; and that having been a mere *caſual* reſidence, and not under the indenture; the ſettlement which he had acquired in *Hedcom* by 40 days reſidence there, under the agreement made by his maſter, ſtill continued there, and conſequently the orders muſt be quaſhed.

GROSE and BAYLEY Juſtices, (LE BLANC J. being abſent,) concurred; and BAYLEY J. ſaid, that the laſt lodging of the pauper in *Smarden* was not a lodging there under the indenture.

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FOLKEIN *against* CRITICO.

Wednesday, May 8th.

The defendant being in custody of a messenger under an order of the secretary of state for the purpose of being sent out of the kingdom by virtue of the alien act, 43 *G.* 3. *c.* 155., the Court refused to issue a habeas corpus on the application of his bail to bring him up that they might render him in their own discharge, on account of the public inconvenience, and of the probable risk of his passage, which had been taken in a ship immediately about to sail to his destined port: and they also refused, while he was still in the kingdom, and might possibly be set at large again, to enter an exoneretur on the bail-piece: but they said they would remember that the situation of the bail was without any fault of theirs, if any proceedings were taken against them in the mean time.

THE *Attorney-General* opposed a rule which had been applied for on the part of the defendant's bail, for a habeas corpus to bring him up, for the purpose of his being rendered in their discharge in this action; and stated from the affidavits, that an order had been issued by the secretary of state for the home department for sending the defendant, who was an alien, out of the kingdom, under the provisions of the late act of the 43 *Geo.* 3. *c.* 155. That the defendant was in the custody of a messenger, in order to be sent to *Smyrna*, to which place there were not many opportunities of sending him at the present period; but a passage had been secured for him by government, at a considerable expence, in a vessel immediately about to depart to that port; and if he were now to be brought up to this Court, it would be attended with great inconvenience, and might probably risk the loss of his passage.

The Court thought that this was a sufficient answer to the granting of the habeas corpus; but were not averse to relieve the bail in some other way, who they agreed ought not to be prejudiced by the act of the state interposing to prevent them from making a render, which otherwise they were entitled and in time to do. And Lord *Ellenborough* C. J. adverted to the case of *Fowler* v. *Dunn* (*a*), where the Court had refused a habeas corpus at the prayer of the bail, to bring up a defendant who,

(*a*) 4 *Burr.* 2034.; and vide *Wood* v. *Mitchell*, 6 *Term Rep.* 247; and *Robertson* v. *Patterson*, 7 *East*, 405.

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who, pending the ſuit, was ſentenced to tranſportation, and was then on the point of being tranſported; though they relieved the bail in another way.

Comyn, who had moved the rule on the authority of *Sharp* v. *Sheriff* (a), where a ſimilar application was granted in the caſe of one in cuſtody on a charge of felony, ſaid, that he was not anxious to ſuſtain this mode of relieving the bail, if the Court thought that there was another more preferable mode of doing the ſame thing: and therefore, upon the preſent rule being diſcharged, he propoſed moving immediately for a rule to enter an exoneretur on the bail-piece.

The Court, however, ſaid, that they would not grant it immediately, while the defendant was ſtill in the kingdom, and might poſſibly be ſet at large again; but they would not forget their preſent impreſſion of the caſe, as to the ſituation of the bail, if any proceedings were had againſt them in the mean time, whenever the matter was properly brought before the Court again; though for the preſent they would not make any rule for exonerating them.

(a) 7 *Term Rep.* 226.

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FENTON and Others *against* GOUNDRY.

Friday, May 10th.

In a count against the acceptor of a bill of exchange, stated to be *accepted payable at S. and Co's*, it is sufficient to allege *generally* a request by the plaintiff to the defendant to pay the bill, without alleging that it was presented for payment *at the particular place*. And no objection can be taken on demurrer, not assigning at least the cause specially, that after stating the day on which the bill was *drawn*, which was made payable at a *future* day, the count alleged that "*afterwards, to wit*, on the *same* day," &c. the demand of payment was made.

THE declaration stated, that whereas the plaintiffs heretofore, to wit, on the 4th of *January* 1810, at *Leeds*, &c. according to the usage and custom of merchants, &c. made their certain bill of exchange in writing, &c. dated the same day and year above-said, and directed to the defendant by the firm and description of Messrs. *W. Goundry* and Co., 54, *Lower Shadwell, Wapping, London*, and by the said bill the plaintiffs, four months after date, required the defendant to pay to their order 237*l.* 12*s.* 6*d.* value received; which said bill the defendant afterwards, to wit, on the same day and year above-said, at *Leeds*, &c. upon sight thereof, *accepted*, according to the said custom, *payable at* C. Sikes, Snaith, *and Co.* and the plaintiffs averred, that they had not made any order for the payment of the said sum, &c.: by reason whereof, according to the said custom, and by the law of merchants, the defendant heretofore, to wit, on the same day and year above-said, at *Leeds*, &c. became liable to pay to the plaintiffs the said sum of money in the said bill mentioned, at the time when the same should become due and payable, *according to the tenor and effect of the said bill, and of his acceptance thereof as aforesaid:* and being so liable, the defendant, in consideration thereof, afterwards, to wit, on the same day, &c. at *Leeds*, &c. *promised* the plaintiffs to pay to them the said sum in the said bill specified, at the time when the same should become due and payable, *according to the tenor and effect of the said bill, and of his said acceptance thereof as aforesaid:* yet the defendant, not regarding his promise

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in form aforesaid, hath not paid to the plaintiffs the said sum, &c. although so to do, he the defendant, *afterwards*, to wit, *on the same day and year* last above-said, and often since, at *Leeds* aforesaid, in the said county, was *requested* by the plaintiffs; but to pay the same to the plaintiffs, he, the defendant, hath hitherto refused, and still refuses, to the plaintiffs' damage of 260*l.* &c. To this the defendant demurred, and assigned these special causes, that it does not appear that the bill of exchange mentioned was duly presented *at* C. Sikes, Snaith, *and Co.* for payment thereof, *according to the tenor and effect of the acceptance;* but for any thing appearing to the contrary, it might have been presented at any other place than at *Sikes, S.* and Co. where it was made payable: and that the declaration does not contain any averment of a due presentment for payment of the said bill, according to the tenor and effect of the bill and of the said acceptance.

Marryat, in support of the demurrer, first took a preliminary objection in point of form to the count, that the only date, given to the demand of payment of the bill and of the defendant's promise, is by reference to the 4th of *January* 1810, the date on which it is stated to have been drawn, which is four months before it became due. [But the Court said, that the date of the demand and promise to pay was laid under a videlicet, and stated to be *afterwards;* and it was clearly no substantial cause of demurrer; and if meant to be relied on as an objection, it ought to have been stated as a special cause of demurrer, which it was not (*a*).] He then proceeded to the principal

(*a*) *Holroyd*, for the defendant, observed, that the allegation was confined to the *time* when the bill should become due; viz. "by reason "whereof,

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principal objection, that the defendant, having given a *qualified* acceptance of the bill, payable at a particular place, the plaintiffs could not recover upon it, without shewing their compliance with that qualification by a demand of payment at the place. The bill being drawn generally, the plaintiffs might have rejected any other than a general acceptance; but having consented to take a special acceptance, they were bound by the terms of it, and could not afterwards reject the qualification. The defendant did not engage to pay the bill indefinitely at any time or place after it became due, but only at the particular place mentioned, where he was to provide the fund for payment of it: and this superseded the necessity of his carrying the money about with him wherever he might happen to go. By the general law, an acceptance may be conditional; as when the party is in cash (*a*); or it may be qualified as to *time*; as, if a bill be drawn at two months, it may be accepted payable at *four*, if the holder consent to take such an acceptance; and he cannot then demand payment before the extended time. Why then may there not be a qualified acceptance as to *place?* The convenience of the thing is greatly in support of such a qualification. Most persons keep their money at a banker's, and make all their principal payments there: there they, or their appointed agents for this purpose, are sure to be found at all the accustomed hours of business; and there, if any where, is the fund out of which the payment is to be made,

(*a*) *Julian* v. *Shobrooke*, 2 *Wilf.* 9.

" whereof, &c the defendant became liable to pay to the plaintiffs the " said sum of money in the said bill mentioned *at the time* when the same " should become due and payable, *according to the tenor and effect*," &c.

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The party on whom a bill is drawn may have ample funds in a foreign country, but none here; and he may therefore refuse to accept it generally, but agree to accept it payable in that country where his funds are. If then the holder will take such a restricted acceptance, he ought in justice and good faith to be bound by it; and it is a surprize upon the acceptor, and contrary to the terms of his contract, to make the demand upon him elsewhere. The very mode of declaring in this case, which is the common mode, shews it; for it does not charge, that the defendant became liable to pay generally on request, but "according to the tenor and effect of the said bill, and of his said acceptance thereof as aforesaid." [Lord *Ellenborough* C. J. It comes to the same question, what is the *effect* of the acceptance in this form?] The objection is not new; it seems to have prevailed in *Bishop* v. *Chitty* (*a*), where the drawee of the bill wrote upon it this special acceptance: "Messrs. *Caswall* and *Mount* pay this bill when due for *T. Chitty*." It is to be collected from the report that *C.* and *M.* were the defendant's bankers; and therefore this was in effect an acceptance payable at his bankers. The bill fell due on the 2d of *January*, but no demand was made on the bankers; and they had stopped payment on the 19th; and two days afterwards the money was demanded of the defendant himself. But in an action against him as acceptor of the bill, Lord C. J. *Lee* held, "that it was the loss of the plaintiff; who, though he might have refused to take such an acceptance, yet had now agreed to it: and it was to all purposes in the nature of a draft, which is always considered as actual payment, when a

(*a*) 2 *Stra.* 1195.

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reasonable time to receive it in is elapsed." Now if the holder had not been held bound to make a demand at the banker's, where it was thus specially accepted to be paid, he was certainly in time to demand payment of the acceptor himself, and would have been entitled to recover. [Lord *Ellenborough* C. J. I do not understand the case in that way: the acceptance there operated in a double sense: it was an acceptance of the bill, and it was also a draft upon his bankers payable when the bill should become due. Then the case amounts to no more than this, that the plaintiff having taken a draft of the acceptor upon his bankers, written upon the same paper as the bill, neglected to present it within a reasonable time after it became due; and in the mean time the bankers failed, and the plaintiff by such laches made the loss his own. The real defence there was payment of the bill by the defendant's draft, which the plaintiff had taken in payment and had made his own by his laches.] This is in effect the same thing. [*Bayley* J. It does not appear on this record that *Sikes* and Co. were bankers, or that the defendant had funds in their hands; nor do the terms of the acceptance purport to be a draft by the defendant upon them: no such question therefore can arise as in the case cited.] The recent case of *Ambrose* v. *Hopwood* (*a*), is directly in point; though, as explained in a subsequent case of *Callaghan* v. *Aylett* (*b*), the action was against the *drawer*, and not against the *acceptor*: but the bill being made payable *at Freeman and Co. No. 6. Church-street, Bermondsey, Southwark*; and it being only alleged that payment was demanded of *Freeman* and Co., without averring a demand at the particular place stipulated; the

(*a*) 2 *Taunt.* 61. (*b*) 2 *Camp. N. P. Caf.* 549, 550. The report of that case was not published at the time of this argument.

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Court of C. B. held upon special demurrer that that was not sufficient. The case of *Callaghan* v. *Aylett* also supports the same doctrine; for that was an acceptance "payable at *Ramsbottom* and Co.'s, bankers, *London*;" and it was held necessary to present the bill for payment there in order to charge the acceptor.

Holroyd, contrà, said, that till the case of *Ambrose* v. *Hopwood* (*a*), recently decided in C. B. (which does not appear to have been much discussed, and the grounds of which are not stated; but it appears that the plaintiff had leave to amend;) this form of acceptance had never been considered otherwise than as a general acceptance, including a memorandum or intimation to the holder where he might get payment if he chose to present the bill there. It was so considered in a case of *Smith* v. *Delafontaine*, tried before Lord *Mansfield* C. J. in 1785 (*b*): again in *Lyon* v. *Sundiers* (*c*), before Lord *Ellenborough* C. J. in 1808; who said that it had been decided by the Court some time ago, that the words "payable at," &c. formed no part of the contract, and did not require to be set out in the declaration: and again by *Bayley* J. in *Wild* v. *Rennards* (*d*), in 1809. The same point had been before expressly determined by the Court of C.P. in *Saunderson* v. *Judge* (*e*) where at the foot of a promissory note there was a memorandum by the maker that he would pay it at the house of *Saunderson* and Co.: and the declaration against the indorsee of the note was in the common form, without noticing that it was to be paid there: and the Court held that it was no part of the contract, and not necessary

(*a*) 2 *Taunt.* 61. (*b*) *Cun. L. of Bills of Ex.*
(*c*) 1 *Camp. N. P. Cas.* 423. (*d*) *Ib.* 425.
(*e*) 2 *H. Blac.* 509. Vide *Parker* v. *Gordon*, 7 *East*, 385.

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to be ſtated. If words of this deſcription be deemed to make the acceptance ſpecial, queſtions will ariſe how far the drawer and prior indorſers are diſcharged; for they would certainly be diſcharged in the caſe put, of the holders of a bill drawn at two months, taking an acceptance at four. The caſe has been argued as if the terms of the acceptance had been "payable at *Sikes* and Co. *only;*" but there is no ſuch word of limitation. [Lord *Ellenborough* C. J. Is it more than an expanſion of the promiſe to pay? By the acceptance the acceptor engages to pay the bill on its being preſented to him when due; and in the common courſe a preſentation for payment at his uſual place of abode makes him liable every where: what is this then but an extenſion of the place where a demand may be made upon him; a notice to the holder that he may demand payment there; but ſtill impoſing upon him by force of his acceptance a general obligation to pay the bill wherever demanded of him.] But, 2dly, if this were a conditional acceptance, to pay at a particular place, it would not be neceſſary for the plaintiff to aver in his declaration that a demand was made at the place, but it would be matter only of defence, to be ſhewn on the part of the defendant, that he was ready with his money at the place to pay the bill when it became due, but that the plaintiff did not come there to demand payment; that he has always been ready ſince then to pay it, and that he now brings it into court. This would ſhew that it was the plaintiff's own fault that he did not receive payment of the bill when it was due; and if the acceptor proved that he had the money at his banker's ready to pay the bill if preſented there, it would be equivalent to a tender at the time and place appointed. Where ſomething is to be done by both parties, at the ſame

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ſame time, the defendant who is ſued for a breach of his part of the engagement muſt ſhew that he did all that lay upon him to do, and that the plaintiff did not perform his part, which prevented the defendant's performance. Here then, if the contract were to pay at a particular place, it is no excuſe for the defendant that the plaintiff did not go there to demand payment, unleſs he himſelf was ready at the place to make the payment if demanded; for otherwiſe he does not ſhew that the non-performance of his part was wholly attributable to the fault of the plaintiff; as in the caſe of a tender and refuſal, which goes upon the ſame principle. [*Bayley* J. An award to pay money commonly directs it to be paid at a given time and place: yet a demand after the time or at any other place made upon the debtor is always deemed ſufficient to enforce the award againſt him. Lord *Ellenborough* C. J. Would it not be a good form of declaring on a covenant by a mortgagor to pay the principal money at *Lincoln's-Inn-Hall* on ſuch a day, to allege the breach generally, that he did not pay it on demand, without ſaying at that place; for ſuch a general allegation, that he did not pay it, includes that he did not pay it there or elſewhere?] He referred in confirmation of this doctrine to *Lit.* ſ. 340. with Ld. *Coke*'s Comment at the end: *Co. Lit.* 211. *a.* and *Fraunces*'s caſe, 8 *Rep.* 92. *b.*

Marryat in reply. There is no analogy between contracts merely pecuniary and thoſe relating to the realty; they are governed by different principles; and therefore the authorities drawn from the one do not bear upon the other. In the abſence of any ſtipulation as to the place of payment, the law, in the caſe of real contracts, permits the debtor to make a tender on the land, becauſe it

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presumes that the party to whom the money or service is due is to be found there; and there is no necessity for any stipulation of that kind in favour of the debtor; nor is the other precluded from making the demand in person elsewhere. But where money is to be paid on negotiable securities, the party bound cannot know where to look for the holder of the bill or other like security; the holder therefore must first come to demand payment; and this the law allows to be made at the usual place of abode: there is therefore nothing inconsistent with the nature of such a security to stipulate that the demand shall be made at some certain place where the person who is to pay may deposit the necessary fund for that purpose. [Lord *Ellenborough* C. J. Suppose the obligor of a bond conditioned for payment of money at *Lincoln's-Inn Hall* were sued upon it, could he plead a readiness at the day to pay the money there, without making a profert of the money in court?] The consideration may be different in the case of specialties from that of negotiable securities. Neither do the instances apply of motions for attachments for non-performance of awards upon a personal demand of money elsewhere than at the place mentioned in the award; because an attachment is process of contempt, which requires a personal demand and refusal of the money to warrant it, and the party might never be found at the place. [*Bayley* J. There must have been a prior breach of the award to warrant the attachment.] As to the case of *Saunderson* v. *Judge* (*a*), it seems from some of the expressions used in the judgment of the Court, that they must have considered that *Saunderson* and Co.'s was the proper place at which to have made the demand of payment according to the form of the note,

(*a*) 2 *H. Blac.* 509.

in

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in the hands of any other holder than *Saunderson* and Co. themselves. Since that case however, the place of payment of a bill has been considered so material, that upon an indictment for a capital forgery of a note, the forging the place where it was to be paid upon the true instrument was held to constitute the offence. [Lord *Ellenborough* C. J. The case you allude to turned upon a different consideration. The object of the forgery was to accredit the note by withdrawing the name of an insolvent house where it was made payable, leaving only that of a solvent house.] The argument used for the prisoner was the same as here; that the drawers had at all events bound themselves to pay the note every where, and therefore the mention of a particular place was immaterial. [*Bayley* J. It makes a great difference in the instrument whether the parties to it may have a demand made upon them for payment at a certain place in the country, or at that place, and also at another place in town.] It may make a very essential difference in the value of the bill, whether it be stipulated to be paid in one place or another; as where it is drawn payable in a foreign country, the difference of the exchange may be considerable. [Lord *Ellenborough* C. J. No doubt the stipulated place of payment may in some cases form an essential ingredient in the contract, as where the bill is accepted to be paid in a foreign country, upon which the exchange varies from this; but was the mention of the place in this case any thing more than a memorandum that payment might be demanded there?] It may also affect the interest of the party liable here; for he may place funds in the banker's hands to await the presentation of the bill; and the banker may break after the laches of the holder in not presenting the bill there in time.

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Lord ELLENBOROUGH C. J. We are placed on this occasion in an anxious situation, either by letting the case stand over for future consideration without any declaration of our present opinion, to throw doubt upon that which has been, as long as I have any recollection of it, the general received opinion of the commercial world upon this subject; or to decide this case adversely to one which appears to have been a recent decision in point of another court, for whose opinion we have great respect. In this situation I should wish, before this case is finally disposed of, to have an opportunity of further considering that decision: but I cannot abstain from stating in the mean time the grounds of my present opinion, subject however to any change which upon further inquiry I may see reason to adopt. Since I have been familiar with the practice and doctrine concerning bills of exchange, I have always understood that an acceptance, though stated to be payable at a certain house of trade, binds the party to pay the bill generally and universally; and that there is no occasion to make a demand at the particular place in order to found the right of action on the bill, but that the action itself is a demand upon the party sued. For the information of the holders, bills are generally directed to the drawees at their usual place of residence; but it is no part of the contract that the bill shall be presented there. The drawees may change their residence while the bill is running; or they may dwell at one place and carry on their business at another: many persons during the hours when payments are usually made are often occupied elsewhere than at their own houses: and therefore it has become a frequent practice, in order to avoid the inconvenience to the holder, of not having his bill honored when he calls for payment at the party's ordinary place of residence,

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dence, to intimate his other houſe of reſidence for the purpoſe, if I may ſo expreſs it, which is at his banker's, where he engages, as it were, to be found at the uſual hours of buſineſs: and this is done for the mutual convenience of both parties, the payer and the payee; not conſidering the houſe of payment mentioned, according to what was ſaid in *Saunderſon* v. *Judge*, as part of the contract between the parties, but merely as an intimation, for the convenience of both, of the place where the holder will be moſt likely to receive payment promptly. The caſe of *Biſhop* v. *Chitty* did not eſtabliſh the contrary: that was nothing more than a converting of the party's acceptance into a draft upon his banker for the amount: and the Court only held that the payee having taken the acceptor's draft on his banker in payment of the bill, and as a ſubſtitution for it; and not having preſented the draft for payment in due time; the acceptor, whoſe draft was ſo taken, was diſcharged by the laches of the holder. Then in *Smith* v. *Delafontaine*, Lord *Mansfield*, to whom the law of bills of exchange was as familiar as to any judge who ever ſat on the bench, was of opinion that no proof of a preſentation at a particular houſe of acceptance was neceſſary. I admit, that in *Callaghan* v. *Aylett* a different doctrine prevailed; and therefore in giving the opinion which I now hold, I do it with a reſerve to look into that caſe; and if I ſee grounds to ſuſpend or alter my preſent opinion, I ſhall declare it before the end of the term. The law is the ſame as to the demand of payment on other ſecurities. The making of a bond payable on demand at *Lincoln's-Inn Hall* is no ſuch term in the contract as to make it neceſſary in an action on the bond to allege a demand made at that place in order to found the right of action; but if the obligor

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were ready with his money there at the day, he muſt plead it as matter of defence. So that in whatever way this caſe is conſidered, it appears to me at preſent that the action is maintainable by ſhewing in the firſt inſtance a demand upon him any where: and I never can conceive that the obligation to pay, which is univerſal upon the acceptor, is to be contracted and limited in its origin, by ſaying that the bill was only payable at the particular place mentioned. However I will not pronounce judgment abſolutely at preſent, till I have conſidered further of the late caſe in the Court of Common Pleas: and if we ſhould ſtill adhere to our opinion, and the defendant is not ſatisfied, the queſtion is upon the record.

GROSE J. Before the late caſe in the Court of Common Pleas I ſhould not have conſidered that the words "payable at *C. Sikes, Snaith*, and Co.," added to the acceptance, could operate to make it a condition precedent to the plaintiff's right of action, that he ſhould have made a demand of payment at that place: and according to other authorities, and to the generally received opinion and practice which had long before prevailed, it is not a condition precedent. I therefore incline to think that the action is well brought.

BAYLEY J. (*a*) According to the preſent impreſſion upon my mind, and not knowing the grounds on which *Callaghan* v. *Aylett* was decided, I conſider this as a clear caſe for the plaintiff: and as miſchievous conſequences would reſult in the mean time from our directing the caſe to ſtand over for judgment, as upon any doubt of our own, if we really do not entertain any now, and

(*a*) *Le Blanc* J. was abſent from indiſpoſition.

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be not likely ultimately to come to a different conclusion, I think it is better to declare our opinions at once, and give judgment nisi for the plaintiff, which will stand if we see no occasion to alter it during the term. For not only if there be any doubt whether this be not a conditional acceptance, the holders of bills may refuse to take such an acceptance; but in many instances it may be their duty to reject it, inasmuch as a conditional acceptance would alter the liability of others upon the bill; and many bills would in the mean time be thrown back upon the drawers. I have never considered this sort of acceptance as any other than an intimation to the holder where the acceptor is to be found. It is as much as to say that he (by himself or agent) will be at the place named ready to pay the bill at the day; but it is not meant to confine his liability to that particular place. But it is said that mischief may result to the acceptor, if the holder do not apply at the place where the fund for the payment of the bill may have been provided, in case of the insolvency of the banker. That however is not the present case, which stands nakedly as an acceptance payable at *Sikes, Snaith*, and Co. Whether they were bankers or not, or whether or not the defendant had any fund there ready to pay the bill, does not appear upon this record: the defendant might have been a mere lodger there. If he were there at the day he would know whether the bill were presented there for payment; and if it were not, he might have taken away his money and not have trusted the persons with whom it was deposited for the purpose any longer. But, besides, if this were to be taken to be a place fixed on by the contract for the payment of the money, and if the defendant had his money there at the day, ready to pay it, if demanded, he might have

pleaded

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pleaded that he was ready to pay the money at the day and place appointed: and bringing the money into court: and that would not be a plea in bar of the action, but in bar only of damages. As in the case of rent payable on the land, if the tenant were on the land at the day ready to pay the money, he may, when sued for non-payment, plead that in bar of the damages, upon bringing the money into court. The like defence may be made to an action for non-payment of money upon an award which directs the money to be paid at a certain time and place: the time and place in that case are not of the essence of the award; and the party to whom the money is due may sue on the award, alleging generally that the money was not paid; though the defendant may say, as in this case, that he was ready at the time and place to have paid the money, but that the plaintiff was not there ready to receive it: but that would be only in bar of the damages, and not of the demand itself; for the defendant would be still liable to pay the money, and must pay it into court. These appear to me to be the principles on which this case ought to be decided differently from the decision which is stated to have been made by the Court of Common Pleas.

Judgment nisi for the Plaintiff.

No further notice was taken of this cause in the course of the term, and therefore the judgment of the Court stood for the plaintiff.

Tuesday, May 14th.

HUGHES *against* THOMAS and Another, Executrixes of ANN EVANS, deceased.

No action lies by the reversioner and owner of the inheritance to recover the value of timber cut by the deceased tenant for life after a fine levied by her, whereby she acquired a base fee, and before the avoidance of such fine and base fee by the entry of the reversioner for that purpose; such entry not revesting the reversioner's old estate *by relation during the continuance of the base fee* thus created, so as to entitle him at law to the timber and other mesne profits taken during that interval. Even supposing that after the statute of limitations had run against the appropriate action, by the reversioner against the tenant for life, for mesne profits, or for waste, upon the original wrongful act of cutting down and converting the trees, an action of assumpsit for money had and received for the purchase-money of the trees sold, which was in fact paid to the former tenant for life within the six years, was maintainable against her representatives after her death.

THE plaintiff declared in assumpsit upon the common counts for 2000*l.* money lent and advanced by the plaintiff to the testatrix in her lifetime; and for money paid, laid out, and expended for her use; and for money had and received by her in her lifetime for the use of the plaintiff; which she promised to pay to the plaintiff; and upon an account stated between them. There were similar counts upon promises by the defendants as executrixes. The defendants pleaded, that neither they, since the death of the testatrix, nor she in her lifetime, made any such promise: and further, that neither of the several supposed causes of action accrued to the plaintiff at any time within six years before the exhibiting of the plaintiff's bill: on which issues were joined: and at the trial a special verdict was found, negativing the promises by the defendants as executrixes: and as to the residue of the first issue, and as to the last issue, the jury found a special verdict.

That *Richard Davies* being seised in fee of lands in *Mydrim* and *Llanwinio*, in the county of *Carmarthen*, devised the same by his will, dated 16th of *August* 1783, to *T. Howell* and *R. Thomas*, and their heirs, in trust to the use of his wife *Grace Davies* for life; with remainders to the use of his brother *Thomas Davies* for life; to his first and other sons in tail male, in strict settlement; with like

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remainders to his brother *William*, and to his firſt and other ſons in tail male, in ſtrict ſettlement; remainder to his ſiſter, *Ann Evans*, widow, (the deceaſed) for life; and from and after the determination of that eſtate by forfeiture or otherwiſe in her lifetime, to the uſe of truſtees during her life, on truſt to preſerve the contingent uſes and eſtates after-mentioned, &c.; but nevertheleſs to permit and ſuffer *Ann Evans* to receive and take the rents, iſſues, and profits thereof during her life, &c.; remainder to the uſe of her firſt and other ſons, in ſtrict ſettlement, in like tail; and in default of ſuch iſſue, to the uſe of his (the teſtator's) own right heirs for ever. The teſtator alſo deviſed other lands; and alſo all other his real eſtates whatſoever and whereſoever, not before deviſed as mentioned, to his brother *Thomas* in fee; and died in 1783 without iſſue; leaving *Thomas*, his brother and heir at law, him ſurviving. On the death of *Richard*, the teſtator, his widow, *Grace*, entered upon and became ſeiſed of the ſaid lands in *Mydrim* and *Llanwinio*, under the deviſe to her for life, and continued ſeiſed till her death, on the 27th of *March* 1788. *Thomas Davies* died on the 9th of *October* 1787, without iſſue; having previouſly, by his will dated the 4th of *September* 1787, duly deviſed to his wife *Eſther*, after various other deviſes (what for the purpoſe of this action may be ſtated ſhortly (*a*) to be) "the reſt, reſidue, and remainder of all his eſtate and effects real and perſonal, &c. (including the reverſion of the lands in *Mydrim* and *Llanwinio*, mentioned in the

(*a*) The will was ſtated at large; as including one of the queſtions upon the title of the plaintiff, who claimed by *Eſther*, the widow and deviſee of *Thomas*; but it having been decided in the caſe of *William*, leſſee of *Hughes* (the now plaintiff,) and *Eſther* his wife, againſt *Thomas*, 12 *Eaſt*, 141., that *Eſther* took a fee in the lands in queſtion, though limited only "to her, her *executors*, &c. for her own uſe and benefit abſolutely," it is unneceſſary here to repeat it.

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will of his brother *Richard*, the first testatór,) for her own use and benefit absolutely." *Esther Davies*, the widow, on the 17th of *February* 1791, intermarried with *Hughes*, the plaintiff. *William Davies* lived in *London*, and died there in 1788, without issue; and soon after *Grace Davies*'s death *Ann Evans* entered into possession of the lands devised to her by *Richard Davies* in *Mydrim* and *Llanwinio*: and being seised thereof for life under the will, levied a fine sur conuzance de droit come ceo, &c. of the same lands at the court of great sessions for the county of *Carmarthen* on the 22d of *March* 1792, with proclamations at the same and the two following sessions. *Ann Evans* continued in possession until her death. In 1802 she sold a quantity of timber then growing on the devised lands in *Mydrim* and *Llanwinio*; but the purchase money was not paid to her by the purchasers till *December* 1804, when she received for it 1075*l*. The whole of the timber was felled, and the greater part of it carried off the premises above six years before this action was brought; and the remainder was carried off within six years. *Ann Evans* died in *March* 1808, without issue; having previously made her will, appointed the defendants joint executrixes and residuary legatees, and devised the lands on which the timber grew to certain persons therein mentioned in fee, as tenants in common. The defendants proved her will, and possessed themselves of her personal estate and effects, which are more than sufficient to pay the said 1075*l*. and the costs of this action. The plaintiff in this cause, and *Esther* his wife, on the 25th of *August* 1808, (being then first apprized of the fine so levied by *Ann Evans*,) levied a fine sur conuzance de droit come ceo, &c. (inter alia) of the same lands in *Mydrim* and *Llanwinio* on which the said timber grew,

grew, to *T. Waters*, as conusee thereof, who previously thereto had no interest or estate in the premises: and on the 1st of *September* 1808 an entry was duly made upon the same by the plaintiff and *Esther* his wife, for the purpose of avoiding all fines levied of the same; which purpose was duly declared at the time of making such entry. In *Michaelmas* term 1808 an ejectment was brought in this court, on the demise of the plaintiff and *Esther* his wife, to recover possession of the same lands in *Mydrim* and *Llanwinio*, in which judgment was recovered (*a*), and a writ of possession issued, under which the said plaintiff and *Esther* his wife were put in possession previous to the commencement of this action, and still are possessed. But whether upon the whole matter the said *Ann Evans* did promise in manner and form as the plaintiff has complained; and whether the several causes of action, or either, accrued within six years before the exhibiting of the plaintiff's bill, the jurors pray the advice of the Court, and find accordingly.

The defendants contended that the plaintiff was not entitled to recover, 1st. Because the plaintiff, by reason of the fine levied in 1792 by *Ann Evans*, had no estate or interest in the premises on which the timber grew when it was felled and disposed of: 2dly, Because, as executrixes, they were not liable for this cause of action: 3dly, Because the present was not the proper form of action: and 4thly, Because the action was barred by the statute of limitations.

Owen Jun[r]. for the plaintiff, on a former day of this term when the case was first opened, was proceeding to

(*a*) This was the case of *William* v. *Thomas*, before mentioned, 12 *East*, 141.

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argue in anſwer to the firſt point, that there was no diſſeiſin of the reverſioner's eſtate on which the timber grew by the fine levied by the tenant for life; which was expreſsly decided in the former caſe of *William, Leſſee of Hughes*, (the now plaintiff) v. *Thomas:* and here the caſe is ſtronger againſt the defendants; for the fact of the entry of the deviſee of the tenant for life is not found, but the diſſeiſin ſtands nakedly on the fine. And if there were no diſſeiſin, then the reverſion was not deveſted. But if deveſted, it was reveſted upon the entry of the reverſioner, to whom the timber belonged at the time it was cut down as part of the reverſionary eſtate and inheritance. [It was then aſked by Lord *Ellenborough* C. J. How the Court could now enter into the conſideration of theſe points in an action for money had and received, when the original wrong and cauſe of action, if any, in cutting down the timber, was barred by the ſtatute of limitations?] The anſwer to this involves the three remaining points made by the defendants; and the ſubſtance of it is that two cauſes of action aroſe to the plaintiff and his wife; the one for the tort and treſpaſs in cutting down the timber, which it was competent to them to wave, and to proceed upon the other, which aroſe on the receipt of the purchaſe money by the defendants' teſtatrix in 1804, within ſix years before this action brought. Theſe cauſes of action are quite diſtinct; and the diſtinction was well marked in *Hambly* v. *Trott* (a), where it was held that trover would not lie againſt an executor for a converſion by his teſtator; but that aſſumpſit would lie for the value of the property ſo converted; and this very caſe was put by Lord *Mansfield* in delivering the judgment of the Court after full conſideration, that

(a) *Cowp.* 376.

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" an executor ſhall not be chargeable for the injury done by his teſtator, in cutting down another man's trees; but for the benefit ariſing to his teſtator, for the value or ſale of the trees, he ſhall." And the reaſon afterwards given is, that though as far as the tort itſelf goes, an executor ſhall not be liable, becauſe all public and private crimes die with the offender: yet ſo far as the act of the offender is beneficial, his aſſets ought to be anſwerable, and therefore his executor ſhall be charged. Here then upon the ſeverance of the trees from the freehold by *Ann Evans* the tenant for life, they became the ſole property of the firſt perſon in remainder who had an eſtate of inheritance in the land; but this action for money had and received could not have been brought till 1804, when the teſtatrix actually received the purchaſe money for them. There is no neceſſity for any privity between the parties in order to maintain this action, as appears by Sir *Henry Sherrington*'s caſe (*a*) referred to in *Hambly* v. *Trott*. In all the caſes the only queſtion has been whether the property wrongfully taken were afterwards converted in to money. And in *Longchamp* v. *Kenny* (*b*), where the defendant had poſſeſſed himſelf of goods which had been entruſted by the owner to be ſold at a fixed price, and when demanded of him, he had refuſed to produce them; it was even preſumed againſt him, that he had ſold them and received the money; and he was therefore held liable as for money had and received to the plaintiff's uſe from whom he had taken the goods, and who had before paid the value of them to the owner. In many caſes the tort has been waved againſt the tortfeaſor, and the value of the property converted recovered againſt him in aſſumpſit: ſuch

(*a*) *Sav.* 40. (*b*) *Dougl.* 137.

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are *Arris* v. *Stukely* (*a*), *Howard* v. *Wood* (*b*), *Lamine* v. *Dorrell* (*c*), and *Feltham* v. *Terry* (*d*); and the same principle was lately recognized in *Lightly* v. *Clouston* (*e*), where the master of an apprentice who had been seduced from his service, waving the tort, recovered against the seducer in an action of assumpsit for work and labour done by the apprentice. The Court there considered that the defendant could not set up his own wrong against the action, and that he had the advantage of a set-off.

Lord Ellenborough C. J. Assuming that the plaintiff might have waved the tort, and proceeded in assumpsit against the tenant for life for the value of the trees wrongfully taken; yet it is another question whether when the statute of limitations has run upon the original tortious taking in the lifetime of the wrong-doer, the law will raise a new promise against his executors for the profits of the tort, to take it out of the statute, after the proper remedy is gone.

The case stood over till this day, when the argument was again resumed upon the same point: and

Owen Junr., adverting to the form of the plea of the statute of limitations, that *the cause of action* did not accrue within six years, contended that the cause of action now sought to be enforced had no existence till the actual receipt of the money in *December* 1804; the injury to the reversion which took place before was

(*a*) 2 *Mod* 262. (*b*) *T. Jones*, 127. (*c*) 2 *Ld. Ray*. 1216.
(*d*) *E*. 13 *Geo*. 3. *B. R.* cited in *Cowp*. 419. and 1 *Term Rep*. 387.
(*e*) 1 *Taunt*. 112.

different in its nature as well as form; and might, as in the case of ornamental timber, exceed the value received for the trees. The reversioner had no control over the tenant for life to cause her to sell it when cut down, or accelerate the payment of the money: it was her own act to give time of payment till a later period. In *Pecke* v. *Ambler* (*a*) it is said that if an assumpsit be to do a thing on request, as to indemnify; and a damnification accrue in part at one time and in part at another; though parcel were before the six years, and parcel within that time, the plaintiff may have an entire action after the last time of damnification. The case however is stated differently in different books. [Lord *Ellenborough* C. J. There is no occasion to cite cases which may be very questionable: for if the receipt of the money give the cause of action in this case to the plaintiff, the statute of limitations would not be in his way. But is there any case upon the principal point, to shew that where tenant for life has by levying a fine acquired a base fee, an action lies for timber cut down afterwards and before an entry made to revest the estate of the reversioner: and that the entry when made will by relation vest the property of the timber so taken in the interval in the reversioner?] Even if the reversioner had been disseised (which the Court held in the former case that he was not,) still she had an interest left in the estate. Even after the right of entry is taken away the true owner may bring his real action. But against the operation of a fine, the statute of fines (*b*) saves the right and interest of all persons other than the parties to the fine, if they pursue their remedy

(*a*) *W. Jones*, 330. and 15 *Vin. Abr.* 116. *Godb.* 437. 4 *Bac. Abr.* 474. and *Cro. Car.* 139.

(*b*) 4 *H.* 7. *c.* 24.

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by action *or entry* within five years after such right accrued: when therefore the entry was made, as it was in due time, by the reversioner, it did away all effect of the fine as to her, and restored all her rights and remedies as they existed before. The statute says that "the said persons (i. e. those entitled, who pursue their remedy within the time limited,) and their heirs may have their said action against the pernor of the profits of the said lands, &c. at the time of the said action to be taken." The effect of an entry to revest fully and for all purposes the estate of the reversioner is not at all impugned by the judgment of the Court in *Goodright* v. *Forrester* (*a*), which only established that the fine of tenant for life devested the estate of the remainder-man or reversioner till entry. There too, there was an actual alienation of the estate by the party levying the fine; but here, the tenant for life continued as before in possession after the fine levied. But it was agreed that the reversioner might either enter within five years after the forfeiture incurred by levying the fine, or wait till within five years after the natural determination of the estate of the tenant for life. All the other authorities go upon the distinction as to the effect of the fine in devesting the estate in remainder, where the tenant for life afterwards aliens, and where he continues in possession; which is in favor of the plaintiff so far as it bears upon the point in judgment. Such are *Co. Lit.* 251. *a. b.*, and 327. *b.*, and *Saffyn*'s case, 5 *Rep.* 123. *b. Doe* v. *Hellier*, 3 *Term Rep.* 173. and *Focus* v. *Salisbury*, *Hardr.* 400. And where no new use is declared, or the reversioner is no party to the fine, the old use continues in him. *Armstrong* v. *Wolsey*, 2 *Wils.* 19. *b.*,

(*a*) 8 *East*, 552. and vide S. C. upon error brought in the Exchequer-chamber, 1 *Taunt.* 578.

and

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and *Roe* v. *Popham*, *Dougl.* 24. [Lord *Ellenborough* C. J. Is there any cafe to fhew that where an entry is neceffary to reveft the eftate of the reverfioner after a fine levied by the tenant for life, fuch entry revefts the eftate by relation to the fine which devefted it, fo as to cover the intermediate period?] In the cafe of *Garth* v. *Cotton* (*a*), Lord *Hardwicke* C. J. laid it down, that "If leffee for life make a feoffment in fee upon condition; the feoffee does wafte, and afterwards breaks the condition, and the leffee for life enters for the breach: *though the reverfioner had nothing in the reverfion at the time of the wafte done; yet as it was out of him by tort, when it is revefted he fhall have this remedy;*" that is the action of wafte. For which he cites *Co. Lit.* 356. *a.* The timber never was part of the eftate of the tenant for life (*b*): and the authorities cited in the former cafe of *William* v. *Thomas* fhew that the eftate of the reverfioner never was devefted by the clandeftine fine levied by the tenant for life, who ftill continued in poffeffion. [Lord *Ellenborough* C. J. If the tenant for life acquired a bafe fee by the fine, the timber would then be part of her new eftate.]

Jones, contrà. The Court did not decide this point in the former cafe; they only decided that the fine of the tenant for life, though afterwards followed up by the poffeffion of her devifee, did not work a diffeifin; but there was no queftion that the effect of the fine was to deveft the reverfion and leave the reverfioner only a right of entry; and that was the exprefs ground of decifion in *Goodright* v. *Forrefter* (*c*), and the fame doctrine was laid

(*a*) 1 *Dickens*, 183—206. from Lord *Hardwicke*'s MS.
(*b*) 2 *Com. Dig.* tit. *Biens*, H. (*c*) 8 *Eaft*, 552.

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down in *Focus* v. *Salisbury* (a), and *Compere* v. *Hicks* (b). The latter case also decides the point now in judgment; for it was there held that where an entry was necessary to avoid the fine of tenant for life, the remainder-man, even after such entry made, cannot lay his demise in an ejectment, or recover the mesne profits that accrued, before such entry.

Lord ELLENBOROUGH C. J. That case decides the present question, that there is no relation back of the title beyond the time of entry to avoid the fine. That was an action for mesne profits; and it was held that the remainder-man could not recover the mesne profits which had been taken by the defendants before his entry. Lord *Kenyon* grounded his opinion upon the authority of *Berrington* v. *Parkhurst* (c), in which Lord *Hardwicke* had said that in the case of a fine the party has no title before entry, not on account of the st. 4 *H.* 7. (d), but on account of the puissance of a fine at common law. His Lordship then read the rest of the opinion delivered by Lord *Kenyon* in that case; and concluded by saying that if the reversioner had no title before the entry to avoid the fine, the plaintiff could have no right of action to recover the value of the timber cut down between the fine levied by the tenant for life, and the entry of the reversioner to avoid it.

Owen then endeavoured to distinguish that case from the present; upon the distinction between *trespass*, which is grounded on a tort, and *assumpsit* founded on an implied promise in law to pay that which in con-

(a) *Hard.* 402.
(b) 7 *Term Rep.* 727.
(c) *Andr.* 136. & vid. *Willes*, 327.
(d) 4 *H.* 7. c. 24.

science

ſcience is due to the plaintiff from the defendants: and between an action for the common meſne profits of the eſtate, (as that caſe was,) which a legal poſſeſſion alone would entitle the tenant in poſſeſſion to take, and an action for the value of timber, which was ever part of the lawful inheritance.

Lord ELLENBOROUGH C. J. If the plaintiff could not have maintained an action of treſpaſs againſt the teſtatrix herſelf, the original wrong-doer, to recover the meſne profits accruing between the levying of the fine by her and the entry of the reverſioner, which is the more proper remedy; how can this action be maintained againſt her executrixes upon an implied aſſumpſit in law? There can be no difference in the ſubject-matter of demand in the two actions; for whatever be the profits which a wrong-doer takes out of the eſtate, be it graſs, corn, or timber, it is equally recoverable, if at all, in an action for meſne profits. Our opinion is founded upon the authority of *Compere* v. *Hicks*, as that was founded upon the prior caſe of *Berrington* v. *Parkhurſt*. Thoſe authorities have laid a clear ground for our deciſion in this caſe. On the firſt breaking of the argument, I wiſhed to hear how far the action for money had and received would lie in ſuch a caſe as the preſent, where, though the purchaſe money for the timber had been received within the ſix years, yet the remedy for the original tort in cutting down and converting it was bound by the ſtatute of limitations; and therefore I interrupted the plaintiff's counſel in the train of his argument on the principal point; but the caſe which he cited from *Cowper's Reports* did ſo far bear him out, as to alter the impreſſion which I had before received on reading this caſe. On that point however I deſire not to be conſidered as pledged;

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pledged; for my decision in the present case will be founded altogether on *Berrington* v. *Parkhurst*, and *Compere* v. *Hicks*. Here a tenant for life, after levying a fine, cut timber, and sold it; and the money for the timber has been received within a time before the action brought not barred by the statute of limitations. By levying the fine the tenant for life had acquired a base fee, and had devested the estate of the reversioner; and during the continuance of that base fee, which endured till the entry of the reversioner, she was unimpeachable for that act. And now after her death, the question is made whether the value of the timber so cut can be recovered upon an implied assumpsit in law against her representatives, as for waste committed, or for mesne profits received by their testatrix during her possession of the land. If she had lived, the case of *Compere* v. *Hicks* is decisive that the action of trespass for mesne profits, or in any other shape, for recovering the value of the timber, could not have been maintained against her. It was there held that the entry of the remainder-man to avoid the fine levied had no relation to revest his interest in the land, so as to give him an action for the mesne profits that had accrued antecedent to such entry. Then if the proper action could not be maintained against the wrong-doer herself, still less can the substituted action for money had and received lie against her representatives.

Grose J. declared himself of the same opinion.

Bayley J. (a) If the plaintiff have any remedy it must be in equity. The effect of the fine was to give

(a) *Le Blanc* J. was absent from indisposition.

the

the tenant for life a base fee liable to be defeated by the entry of the reversioner either within five years from the levying of the fine, or from the death of the tenant for life: but till the fine was avoided, it gave her a fee which would entitle her to the trees as part of the inheritance so acquired. This is not like the case of a fine levied by a copyholder or mortgagor; because they have interests in the land collateral to the freehold, and their possession is consistent with the rights of the lord and of the mortgagee: and therefore their fines will not operate on the title of the lord (*a*) or the mortgagee (*b*), unless there be also a displacing of their possession. The fine of a mortgagor would operate only on the equitable and not on the legal estate. But a fine levied by a tenant for life operates upon the freehold, and must be avoided by the entry of the remainder-man or reversioner, whose estates are devested by the fine, before they can maintain an ejectment; and even after such entry it was held in *Compere* v. *Hicks*, that it gave them no title by relation during the antecedent period, but only from the time of such entry. That case was decided on the authority of *Berrington* v. *Parkhurst*, where the demise was laid before the entry made to avoid the fine; and the question was whether, when made, it had relation to revest the remainder for the intermediate time between the levying of the fine, and the entry made to avoid it: and it was held that it had no such relation, and that the ejectment was not maintainable, because the demise was laid previous to the entry: for, according to the report of the case in *Andrews*, "the party hath no title before an entry, &c., and consequently the demise is absolutely void; and it cannot be made good by a subsequent entry by relation,

(*a*) *Co. Cop. f.* 55. (*b*) 2 *Vef.* 482.

which

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which can make good such acts only as are voidable. This case therefore is not parallel to an action brought by a disseisee after entry for the mesne profits, to which it has been compared; for here if the lessor be entitled to the mesne profits from the time of his demise, *he will recover them from a time when he had no title*," &c. That was followed by *Compere* v. *Hicks*, where the question did not come upon Lord *Kenyon* by surprize; for it had come before him in the former case between the same parties of *Doe d. Compere* v. *Hicks* (*a*), in which the lessor of the plaintiff recovered upon the second count laying the demise after the entry; the Court holding that the entry had no relation back, and gave to the remainder-man no right to the mesne profits accruing after the fine, antecedent to such entry. I cannot distinguish between trees and other mesne profits taken. Timber is part of the profits of an estate; for where there is a right to recover mesne profits, timber may be included. The cases referred to in *Vesey* and *Co. Lit.* are where there was a title by relation; for after a disseisee has recovered possession against the disseisor, he is entitled to all the mesne profits from the time he was disseised. But here the fine of tenant for life having created a fee, though by wrong; the trees, as parcel of the inheritance, were vested in her at the time, and were her property when cut, which was before the entry made to avoid the fee acquired to her by the fine; and therefore the plaintiff has no right to recover the value of them in this action.

Judgment for the Defendants.

(*a*) 7 *Term Rep.* 433.

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[*The following note of the case of* BERRINGTON, *on the demise of* JOHN DORMER, *Esq., against* PARKHURST *et al*, *referred to in the last case, is taken from Mr.* Ford's *MS.*] *Hil.* 10 *G.* 2. *B. R.*

"IN ejectment on a lease made 1st of *Oct.* 1731 by *John Dormer* Esq., upon not guilty pleaded, the jury found a special verdict, that upon the marriage of Sir *J. Dormer*, the son, *John Dormer* Esq. his father, in order to make a tenant to the præcipe, by feoffment of the 13th of *August*, 1662, together with his said son, conveyed the lands in question to *A.* and *B.*, against whom a common recovery was suffered to the uses following: as to a part of the lands, to Sir *John* for life; as to the rest to *John* the father for 99 years if he so long lived; remainder to trustees to preserve contingent remainders; remainder to the first and every other son of Sir *John* for life by the lady he was then going to marry; remainder to his first and every other son by any other wife; remainder to *Robert Dormer* Esq. another son of the said *J. Dormer*, late one of the justices of C. B., for 99 years if he should so long live: and then follow these words; And from and after the decease of the said *Robert Dormer*, or other sooner determination of the said term of 99 years, so limited as aforesaid to the said *Robert Dormer*, to Sir *Robert Jenkinson* and Sir *W. C.* and their heirs, during the life of the said *Robert Dormer*, to preserve and support contingent uses and estates hereinafter mentioned from being defeated,

An actual entry is necessary to avoid a fine, (i. e. with proclamations;) and the lessor of the plaintiff bringing his ejectment upon such avoidance must lay his demise subsequent to such entry. *R. D.* being tenant for 99 years determinable on his life, *remainder to trustees to preserve contingent remainders*, remainder to his first and other sons in tail male, with remainders over; it was questioned at first whether a fine levied by the tenant for years in possession and his eldest son the first tenant in tail in remainder was void against the remainder-man over, by reason that the trustees to preserve contingent remainders, in whom it was contended that a present freehold was vested during the life of the tenant for years, were no parties thereto: but it was held afterwards that the trustees had a vested, and not a contingent remainder; and that the present freehold interest was in them, to commence in possession upon the determination of the term of years by forfeiture or other means, during the life of tenant for years; and therefore that such fine was void against the remainder-man. Neither is the estate of such remainder-man over discontinued, or his right of entry within five years taken away by another fine levied by the daughters of the first tenant in tail male; who, upon his death, wrongfully entered and were possessed, and thereby disseised the remainder-man over.

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defeated, and for that purpofe to make entries, &c.; remainder to the firft and every other fon of the faid *Robert Dormer*, and the heirs male of his and their bodies lawfully begotten; and for want of fuch iffue, remainder to *Fleetwood*, *Peter*, and *Bennett Dormer*, brothers of the faid *Robert Dormer*, fucceffively in tail male; remainder to *Eufeby Dormer*, (the father of the leffor of the plaintiff,) for 99 years, if he fhould fo long live; remainder to the truftees and their heirs during the life of the faid *Eufeby*, to preferve contingent ufes, &c.; remainder to the firft and every other fon of the faid *Eufeby* in tail male; remainder to the right heirs of *John Dormer* the father. The verdict further found the death of *John* the father, of Sir *J. Dormer* without iffue; and alfo of *Fleetwood*, *Peter*, and *Bennett*, without iffue; and that *Robert Dormer* had one fon, *Fleetwood*, who with his father, *Pafch.* 12 *Geo.* 1. levied a fine of the premifes to *John Parkhurft* and others, in order to fuffer a recovery; which recovery was accordingly had againft *Parkhurft* and the other cognizees, and *Fleetwood Dormer* came in as vouchee, and the recovery was to the ufe of *Robert Dormer* in fee. The verdict found further, that *Fleetwood*, the fon, died without iffue, and then *Robert Dormer* died, leaving *Elizabeth*, the wife of Sir *John Fortefcue Aland*, one of the defendants, and three other daughters; and that they entered into the premifes and took the profits; and afterwards in *Eafter*, 3 *G.* 2. levied a fine (*a*) of the premifes to *Thomas Burnett* and others, to the ufe of Sir *John Fortefcue Aland* and his heirs. Then the verdict found the death of *Eufeby Dormer* in 1729, and that his fon, the leffor of the plaintiff, *before the day of the demife* in the declaration, *in order to deliver an ejectment*, entered

(*a*) It appears by the argument that it was a fine with proclamations. And vid. *Doe* v. *Watts*, 9 *Eaft*, 17.

into

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into the premises, *but not to the purpose of avoiding the fine*. That upon the 6th of *January* 1731, he did enter, *as he did also on the 6th of* October 1732, *and upon the 5th of* October 1733, *in order to avoid the fine* (*a*). That the entry upon the 6th of *January* was precedent to the bringing his ejectment; *but that there was no actual entry to the purpose of avoiding the fine till after the date of the demise*. And if upon the matter found the lessor's entry were lawful was the doubt made by the jury.

[It is not necessary to insert the argument, which was very long; as the substance of it may be seen in the report of this case in *Andrews*: but the following note of what was said by Lord *Hardwicke* C. J., at the conclusion of the first argument, shews the grounds on which he at first doubted, whether the trustees had a vested interest and present freehold at the time of the fine levied and recovery suffered.]

Lord HARDWICKE C. J. The title of the lessor under the settlement in 1662 must be admitted. The questions in this case are two:—1. If any thing be found by the verdict to be done that bars such title; and if not, 2. Whether the ejectment can be maintained for want of an actual entry before the demise. As to the first point, it is clear that if *Fleetwood Dormer*, at the time of levying the fine in *Easter* term, 12 *Geo.* 1. had no freehold in him, but only a remainder in expectancy, nothing passed by that fine; but the recovery suffered in pursuance of it was a void recovery for want of a tenant to the præcipe. The cognizors of that fine were *Robert* the father and *Fleetwood* the son; the father, having only a term for

(*a*) There is a mistake in the report in *Andr.* 126, 7. as to the times of entry to avoid the fine.

years,

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years, forfeited his own eſtate, but could not diſplace any of the remainders by that fine. It is true, that tenant for years, by levying a fine, claims a greater eſtate than for years; but ſuch an act does not make out his claim. On the contrary, the law puniſhes ſuch claims in a court of record by a forfeiture of the party's eſtate. So far, therefore, as the fine depends on the eſtate of *Robert Dormer*, it was not a good fine, quia ipſe nil habuit. It is ſaid likewiſe, that *Fleetwood* had nothing in him upon which the fine could operate, but that, by the expreſs limitation of the deed, the eſtate of freehold remained in the truſtees during the life of *Robert Dormer*. But of this I am not ſatisfied. It is indeed the duty of Courts to make ſuch a conſtruction upon deeds as is agreeable to the intention of the parties: and it is alſo true, that the intention of the parties to this conveyance is very ſtrong, that the freehold ſhould veſt in the truſtees during the life of *Robert Dormer*: but I fear the expreſs words of the limitation run directly counter to ſuch intention. The eſtate of the truſtees is to take effect upon one of theſe two contingencies, the death of *Robert Dormer*, which would defeat the term by the expreſs limitation; or elſe by the ſooner determination of *Robert's* eſtate ſome other way. If the eſtate of the truſtees had been to take place only on his death, as it was deſigned to be only an eſtate for his life, that would be void and repugnant; being no more than an eſtate per autre vie, to begin after the death of the autre vie. What then is meant by a ſooner determination? Nothing but a determination by forfeiture or ſurrender, &c. to happen in the lifetime of *Robert Dormer*: and ſuppoſe the limitation had been made to take place upon a forfeiture; as that was a caſual uncertain thing till it happened, nobody

"*It would commence and end in the ſame moment*, Co. Lit. 28. b."

[*See Lord Hardwicke's opinion, upon the eſtate which ſuch truſtees take, in a ſubſequent caſe of Garth* v. *Cotton, in* 1753, 1 *Dickens's Rep.* 190, &c.]

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body could fay whether fuch a remainder would ever veft, and fo muft be a contingent remainder. If this way of arguing be right, and I have heard nothing to the contrary, then the remainder to the truftees was a contingent remainder: no freehold at all ever vefted in them; but on the contrary, as foon as *Fleetwood Dormer* was born, the freehold fettled in him: he had an eftate tail in poffeffion: upon that his fine operated, and created a good tenancy to the præcipe: fo that a valid and effectual recovery was fuffered, which barred all the remainders. I confefs this conftruction oppofes the general defign of the deed; but ftill it is the only one that is confiftent with the words and expreffions of it: and however careful we ought to be in following the intentions of perfons, yet we cannot put words into a deed to fupply and make out what feems to be the intention. But fuppofing fuch recovery void, becaufe *Fleetwood* had no freehold to convey; then the next queftion is, whether either of the fines work fuch an impediment to the leffor's title, that he cannot fupport this ejectment. It is plain that neither of them make any difcontinuance; that being only to be done where the party who levies the fine has fuch a lawful eftate in him, that by conveying his own eftate, others dependant upon his muft be conveyed likewife. The true notion of a difcontinuance is this; the particular eftate and all the remainders over conftituting only one eftate, if the particular eftate be hurt, the refidue of the fee, as fubfifting upon that, muft fuffer likewife: and thence we fay all the remainders are difcontinued, becaufe the chain of interefts which are carved out of the fee, and which depend one upon another, is broken. And therefore if nothing paffed by the fine levied by *Robert* and his fon, quia nil habuerunt, the

"*When remainders are contingent*, Pollexf. 55. 3 *Rep* 19. *Boraston*'s cafe, *Lit. Rep* 219. *pl* 199. *D*. 61. *Ray*. 427. 2 *Cro*. 696. *Hutt*. 118."

"*The notion of difcontinuance.*"

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the remainder of *Fleetwood*, and all the remainders over, continue as they were, and the law confiders each party in poffeffion of his own. As to the fine in 1730, that was levied by ftrangers to the remainders, and fo could work no difcontinuance of their eftates. We muft then fee if thefe fines be any bar. As to the firft fine, it would not create any bar: for as the parties to it had no intereft which the fine could enure upon, it was a void fine, and could neither difplace nor turn to a right any of the remainders; without which nonclaim is no bar. But the fine in 1730 was levied by perfons who had the fee, who had diffeifed the remainder-men, and acquired the whole inheritance: and unlefs fomething has been done to avoid the force of that fine, it muft, after five years, become an abfolute bar. By the purview of the ftatute, fines levied with proclamations are after the proclamations to bind both privies and ftrangers, and were it not for the faving in the ftatute afterwards, fuch fine levied by a diffeifor would immediately become an abfolute bar; but by this faving claufe the force of the bar may be avoided by action or entry within five years. The laft queftion then is, whether the leffor has taken fuch proper fteps as are requifite to defeat the force of the fine, and to fupport this ejectment? And it feems to me that an ejectment cannot be looked on as an *action* within the faving; for if it could, there never could have been a queftion made, whether upon an ejectment an actual entry was neceffary. Befides the faving is to the party who has title, if he purfue his action: whereas this is not the action of the leffor, but of the leffee; and the nature of ejectments feems to prove fuch actual entry neceffary. Thefe proceedings are grounded on a fuppofed right of entry in the leffor, by which right he enters and makes

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the leafe on which the plaintiff declares. Now fuppofe this cafe ftood on the ftatute de donis, before the ftatute of fines, though the words of the ftatute of *Weftminfter* declare a fine levied by tenant in tail to be ipfo jure null; yet the conftruction on that ftatute was, that it took away the entry of the iffue in tail. I mention this to fhew the nature of fines, and that without proclamations they toll the entry. And although by the ftatute of fines the right of entry is faved for a time in order to avoid the fine; yet from the nature of every fine the entry is fo far tolled as not to be recovered but under the circumftances of the faving in the ftatute of fines. The entry then, when made, prevents the bar by the ftatute, and avoids that force which is peculiar and effential to every fine. But without fuch an entry made, the law confiders the party as out of poffeffion, and confequently, before the entry, he could have no right to make the demife to the plaintiff. That fuch an entry muft be an actual entry has been the common received opinion, and the fenfe of the Judges in *Hil.* 2 Queen *Ann.* has now put that matter quite out of doubt. Indeed, in the prefent cafe an actual entry is found, which, from the time it was made, did defeat the effect of the fine in preventing the bar: but as that entry is fubfequent to the time of the demife, the queftion ftill remains, whether the force of the fine did not, in confideration of law, fubfift at the time of the demife, and then the leffor could have no title to make fuch a demife? and one would think it fhould; for otherwife after a recovery in ejectment, the leffor may maintain trefpafs for the mefne profits from his demife; becaufe from thence he is fuppofed to be in poffeffion. If this fubfequent entry fhould fuffice, he would recover the mefne profits when he was actually

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out of possession. On the other hand, as upon the statute of limitations a promise after six years revives the old promise, and draws the case out of the statute, avoiding the force of it ab initio; so one would argue, that after an entry to avoid the fine, the party should, in supposition of law, be esteemed in possession from the time his title accrued. And if such a new promise made pending an action, and before plea pleaded, has been ever allowed in evidence upon any issue of non assumpsit infra sex annos, I should think that would go a great way in the present case.

The other Judges said nothing; but the cause was adjourned for further argument.

Hil. 11 *G.* 2. This case was argued again in *Hil.* 11 *G.* 2. and resolved by the Court, that the fine in 1730 put the lessor of the plaintiff out of possession. That this action is founded on a supposed lease made by the lessor: that this lease supposes him to be in possession; but by this verdict it appears that he was disseised. As then a lease made by one out of possession is a void lease, and the plaintiff has no title but under the lease, and this lease in the present case appears to be void, of necessity he must fail in this ejectment: the judgment, if for the plaintiff, must be quod recuperet terminum suum; and it appears he can have no title to it. Relations in law take place to avoid mesne torts. So after re-entry a disseisee shall recover mesne profits; but no relation can make a void act good. If a good feoffment be made, a subsequent livery confirms the conveyance, and passes the estate; but if a freehold were conveyed to commence in futuro, no livery afterwards would help that conveyance which was originally void. In actions for mesne profits the demise in a recovery in ejectment is conclusive evidence of

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a title from that time: whereas if the plaintiff ſhould recover in this ejectment, treſpaſs for meſne profits might be ſupported before the party had a title. And ſo upon this point judgment was given by the whole Court for the defendant.

As to the limitation to the truſtees, little was ſaid; but the judges rather inclined to think it was contingent, and conſequently the freehold veſted in *Fleetwood Dormer*."

[Another ejectment was brought in the name of *Smith, Leſſee of John Dormer, Eſq.* v. *Parkhurſt and Others*, laying the demiſe ſubſequent to the entry; on which a ſpecial verdict was found to the ſame effect as in this caſe: and after great debate and conſideration it was unanimouſly held in K. B. *Mich.* 14 *Geo.* 2. [7 *Mod.* 366., 18 *Vin. Abr.* 413. *pl.* 8., and *Fearne's Cont. Rem.* 333.] that the remainder to the truſtees was veſted and not contingent, and was to take effect in poſſeſſion on the determination of the precedent eſtate in any manner, by reaſon of the words "or other ſooner determination," &c.: and conſequently that the fine levied and recovery ſuffered by the tenant for years, and his eldeſt ſon the firſt remainder-man in tail male after the eſtate of the truſtees to preſerve contingent remainders during the life of tenant for years, were void. And the judgment for the plaintiff was affirmed on a writ of error in the Houſe of Lords by the opinions of the judges for the reaſons delivered by Lord C. J. *Willes*, in *Willes' Rep.* 327. *S. C.* 3 *Atk.* 135.]

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Tuesday, May 14th.

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The holder in *America* of two bills of the same tenor, having transmitted them to his agents here to present them for acceptance, and receive the money when due, and pay over a part of it to the plaintiff; while the bills so remained in his agent's hands, agreed with the defendant, the indorser, (who had lent his indorsement on each to the drawer, from whom the holder received them,) that upon payment of one of the bills he should be exonerated from both. In the mean time the bills having been presented for acceptance by the agents and dishonoured, *after the dishonour* the agents, not knowing of such agreement between their principal and the indorser, assigned one of the dishonoured bills to the plaintiff, who was informed of the dishonour, and who received it liable to all its infirmities, but without notice of such agreement: held that the bill so received by the plaintiff was bound by the agreement; and that the defendant, having afterwards taken up and discharged the other bill, which had remained in the hands of the same agents, was discharged from both.

THE plaintiff declared upon a bill of exchange, dated *Portsmouth* in *North America* the 10th of *February* 1804, drawn by *J. Clark* upon *Dickerson* and Co. in *London* for 450*l.* sterling, payable at 60 days sight to the defendant or order, and indorsed by him: and alleged that the bill was presented to *Dickerson* and Co. for acceptance on the 27th of *April* following, when it was dishonoured, and protested for non-acceptance, and notice thereof given to the defendant. The defendant pleaded the general issue: and at the trial before Lord *Ellenborough* C. J. at the sittings after *Trinity* term 1810, the plaintiff recovered a verdict for 596*l.*, subject to the opinion of this Court on the following case:

The bill in question, and another of the same tenor, having been drawn by *Clark*, and indorsed by the defendant for the accommodation of *Clark*, and left in *Clark*'s hands so indorsed, were paid over by *Clark* to one *Parry* in *February* 1804. The defendant, *Clark*, and *Parry* were all residing at that time and till after the 14th of *April* following in *New Hampshire*, in *America*. *Parry* on the 1st of *March* following remitted the two bills to *Favell* and *Bousfield*, his correspondents in *London*, accompanied by directions to make a payment to the plaintiff, to whom *Parry* then was and still remains indebted in a large sum. The bills having arrived in *London* on the 26th of *April* following were left by *Favell* and

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Bousfield with *Dickerson* and Co. for acceptance, who returned for answer the next day that they could not accept at present; and the bills were then regularly presented by a notary and protested for non-acceptance, of which due notice was given to the defendant. On the 12th of *April* 1804 *Parry* wrote from *America* a letter to the plaintiff, who resides at *Halifax* in *Yorkshire*, advising him of the beforementioned remittance, and directions to *Favell* and *Bousfield*; shortly after the receipt of which letter in *England* the plaintiff applied for the 450*l.* to *Favell* and *Bousfield*, who on the 6th of *June* delivered over to him the bill of exchange in question; at the same time informing him of the previous presentment to the drawees, and their refusal to accept, and that he must take it under all the existing circumstances, and liable to all the infirmities that attended it. The bill was on the 29th of *June* presented for payment by the persons to whom the plaintiff had negotiated it, and from whom he again took it up, and was finally dishonored on that day.

The defendant produced the following instrument, with the signature of *Parry*, dated the 14th of *April* 1804; the admissibility of which, as evidence against the plaintiff, was resisted at the trial: "Whereas I have two "sets of exchange for 450*l.* sterling, each drawn by "*J. Clark* in favor of *S. Ham* on *Dickerson* and Co. Mer-"chants in *London*, and indorsed by *S. Ham*: now the "condition of the instrument is such that if *S. Ham* pay "or cause to be paid one of the above bills in *London*, I, "the subscriber, agree to exonerate the said *S. Ham* from "the payment of the other bill of 450*l.*, both of which "bills I have remitted to *London* to *Favell* and *Bous-*"*field*. *E. Parry*." It was further proved that on the 2d of *July* the defendant paid *Favell* and *Bousfield* in

cash

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cash and by another note of six months 450*l.* in discharge of the abovementioned bill, which at that time remained in their hands, and was thereupon delivered up to the defendant. Neither the plaintiff or *Favell* and *Bousfield* were apprized till after the said 2d of *July* of the abovementioned agreement of the 14th of *April*, or of any other arrangement between *Parry* and the defendant concerning the bills, or of any infirmity in such bills with respect to either of the parties thereto, other than the drawees' refusal to accept. At the time when the 450*l.* bill in *Favell* and *Bousfield*'s hands was satisfied, no inquiry or mention was made by the defendant concerning the bill which had been handed over to the plaintiff, or any other bill than the one so satisfied; and the plaintiff had no information of any settlement with *Favell* and *Bousfield* being intended. The questions were, 1st, Whether the above agreement of the 14th of *April* ought to have been received in evidence against the plaintiff in this action? 2d, Whether under the circumstances, the plaintiff is entitled to recover, or is barred by that agreement? If the Court should be of opinion that the plaintiff was entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

Marryat, for the plaintiff, contended that the instrument signed by *Parry* (the original holder of both the bills) in favor of *Ham* the indorser, agreeing to discharge him on payment of one of the bills for 450*l.* was no evidence between these parties, as being merely res inter alios acta: or, if evidence, could not operate against the plaintiff, the bonâ fide assignee and holder of the other bill for a valuable consideration, and without notice of the prior agreement; that instrument being in effect

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nothing more than an eventual acknowledgment by *Parry* of a receipt of so much upon one bill in liquidation of his whole debt; which cannot discharge the defendant as indorser upon another bill in the hands of a third person not privy or consenting to the agreement. *Parry* the original holder, by transmitting the two bills, as distinct securities to *Favell* and *Bousfield*, his correspondents in this country, especially when accompanied with directions to them to make payment out of the fund to the plaintiff, which authorized them to negotiate the bills, thereby put it out of his power to make any equitable agreement with the indorser in prejudice of the plaintiff or any other person who might be the bonâ fide holder of the securities. [Lord *Ellenborough* C. J. *Favell* and *Bousfield* were the agents of *Parry* for the purpose of presenting the bills for acceptance and obtaining payment, and making a certain payment out of the fund to the plaintiff: and while the bills were in their hands, as such agents, they were liable to be affected by the acts of the principal; and so they continued to be, at least until the dishonor of the bills. Then, as the plaintiff did not take the bill in question until after it had been dishonored, did he not, according to a variety of authorities, stand in the same situation as the persons from whom he then received it, who were the agents of *Parry?* Would he not therefore stand in the situation of *Parry* himself, who had before such negotiation of this bill bound himself by the agreement with *Ham* to exonerate him from the payment of it if the other were taken up, as it has been? If so, will not the plaintiff who received the bill after its dishonor be bound by the same equity?] The bill was still current when the plaintiff took it from *Favell* and *Bousfield*: and there is

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a great diſtinction between taking it during that period, and after it is over-due: in the latter caſe only is it ſettled that the holder takes it ſubject to all the equities belonging to it in the hands of the party from whom he received it; the reaſon of which is, that when due, it is no longer conſidered as in a negotiable ſtate. [*Bayley* J. It is certainly ſtill negotiable when due. But is there any caſe where a diſtinction has been taken between a bill diſhonored for non-acceptance, and where it is ſo for non-payment: it has equally the mark of diſhonor on the face of it: the noting for diſhonor is always annexed to the bill. Lord *Ellenborough* C. J. The caſe of *Boehm* v. *Stirling* (a) ſhews that a note over-due is ſtill negotiable, though the party receiving takes it ſubject to the equities attached to it in the hands of the former holder: but after the diſhonor in the firſt inſtance the holder might immediately have ſued the drawer.] Suppoſing the plaintiff to be affected by the equity attached to the bill as againſt *Parry*: yet nothing appears to preclude *Parry* himſelf from recovering on the bill: his aſſent to receive part of his demand from his debtor for the whole, (no fund being provided for the ſatisfaction of the remainder, nor any agreement for this purpoſe with third perſons or other creditors) would not bind him in law or equity. Then again before the agreement was executed the bill in queſtion had changed hands for a valuable conſideration. It was aſſigned to the plaintiff by *Favell* and *Bousfield* on the 6th of *June*; and it was not till the 2d of *July* that the other bill was taken up and ſatisfied by the defendant to *Favell* and *Bousfield*, who were all the time ignorant of the agreement between *Parry* and the defendant. But after the plaintiff had become the holder

(a) 7 *Term Rep.* 423.

of

of one of the bills for a valuable consideration and without notice, the defendant could not discharge himself from it under the equity of an agreement known only to himself and *Parry*, by making satisfaction for the other bill, without any inquiry after this, in order to learn whether it had been negotiated. [Lord *Ellenborough* C. J. *Favell* and *Bousfield* had no authority from their principal to pass the bill at all to the plaintiff. The two bills were remitted to them as agents for *Parry* to receive payment of them, and out of the money when received to make a certain payment to the plaintiff. *Bayley* J. They altered the situation of their principal by handing over the bill to the plaintiff; for though his name was not upon it, yet if the plaintiff could recover upon it against *Ham*, that would make *Parry* liable over to *Ham*, which he did not contemplate when he put the bills in the hands of his agents for the purpose which he directed.] The agreement was executory till after the time when the plaintiff became the holder of this bill: but if the payment of one of the bills could be a satisfaction for the other, the defendant ought not to have satisfied the one in the hands of *Parry*'s agents without inquiring for the other: for if the option rested with him of satisfying which he pleased, it was in his power to make his bargain with the holder of either to defeat the claim of the other.

Copley, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. The plaintiff took this bill after the dishonor of it by the drawees; he therefore took it with all the existing infirmities belonging to it at the time. What then was its infirmity in this case? *Parry*,

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the original holder in *America*, had fent it, together with another bill of the fame tenor, to his correfpondents here, with directions, not to pafs it, but to get it accepted and receive the money when due, and to make a payment thereout to the plaintiff, to whom he was indebted. The money when received to *Parry*'s ufe was to be diftributed in part to the plaintiff, and for that purpofe the bill was put into middle hands. But the period of application never arrived, becaufe the period of payment of the bill never arrived, it having been difhonored when prefented. In the mean time it appears that an agreement was entered into in *America* between *Parry*, the owner of both the bills, and *Ham*, the defendant, virtually declaring that thefe were duplicates in fact of the fame fecurity, and that the payment of one fhould be taken in fatisfaction of both: and even if this had not been fo intended originally, there was nothing in the way of making fuch an agreement between the parties themfelves who were interefted in the bills at the time: for it muft be recollected that *Favell* and *Bousfield* had no authority from *Parry* to pafs the bills. Then the plaintiff, who took it from them after the difhonor, took it with its infirmities, and fubject to this agreement between *Parry*, the then owner, and the defendant; whereby payment of one of the bills was agreed to be received as payment of both. Then payment having been made by the defendant of the other bill which remained in the hands of *Favell* and *Bousfield*, this bill alfo is fatisfied, and the plaintiff cannot recover upon it. Both the points therefore referved at the trial are againft the plaintiff; for the agreement ftated was properly received in evidence; and the plaintiff took the bill after the difhonor, fubject to all its infirmities, one of which was the agreement between

tween *Parry* and *Ham*; which bound the bill in question.

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[illegible] Ham.

GROSE J. was of the same opinion.

BAYLEY J. (a) *Fayell* and *Bousfield*, the agents of *Parry*, were the same as *Parry* himself for this purpose; and it is a known rule that whoever takes a bill after its dishonor takes it with all the infirmities belonging to it. The defendant originally lent his indorsements on these bills to *Clark*, by whom they were paid over to *Parry*; and afterwards *Parry* consented and agreed with the defendant that on payment of one of the bills, the other should also be given up to him. At that time *Parry* had fair reason for believing that he had authority to make such an agreement, because he had transmitted the bills to his correspondents, not to pass them away, but to receive the money upon them from the drawees, and pay over a part to the plaintiff when received: but the money never was received by *Parry*'s agents, and while the bills were still in their hands *Parry* made the agreement with the defendant which bound those bills.

Postea to the Defendant.

(a) *Le Blanc* J. was absent from indisposition.

On

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Thursday, May 16th.

The King *against* Barfoot, Phillips, and Easton.

A custom-house officer has authority to seize uncustomed goods, with the carriage and horses carrying off the same, though out of the limit of the particular port of which he is denominated an officer in his deputation from the commissioners of customs.

AN information charged that on the 1st of *July*, 50 *G.* 3. at *Lewisham* in *Kent*, *J. Phillips* being *one of the officers of customs* of our lord the king, with *Barfoot* and *Easton*, watermen, acting in his aid and assistance as such officer, seized to the use of the king, as forfeited, certain goods (*Bandanna* handkerchiefs, &c.) and a carriage and two horses drawing the same, used in the conveyance of the said goods, which might be lawfully seized by *Phillips* as such officer. That *Barfoot* and *Easton*, so acting in his aid and assistance, had the same in their custody and possession; and that it was the duty of *Phillips*, as such officer, and of the other defendants so assisting him, to secure the same goods, carriage, and horses, so seized for the use of the king. That the three defendants, having made such seizure, unlawfully intending to cheat and defraud the king in his revenue of the customs, after the seizure, and while the goods, carriage, and horses were in their possession, unlawfully and corruptly, and contrary to their duty in that behalf, took and received from one *J. P.* a bribe (stating it,) unlawfully, corruptly, and contrary to their duty in that behalf, to relinquish the possession of the said goods, &c.; so that the same should not be received for the use of the king; and did wrongfully, corruptly, and contrary to their duty in that behalf, relinquish the possession of the said goods, &c.; and the same, though seized as aforesaid, were not secured for the use of the king. In contempt, &c.

The statute 8 *Ann. c.* 7. *s.* 17. gives authority to seize such goods, with the boats, carriages, and horses, &c. used in landing or conveying the same.

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The KING against BARFOOT.

When the defendant *Barfoot* was brought up after trial and conviction to receive judgment:

Gurney, on his behalf, (having obtained leave of the Court for that purpose within the four first days of the term,) objected to the evidence given at the trial as to the authority of *Phillips* to make the seizure in question (*a*), which was in fact made in a chaise upon *Blackheath*, as being out of his jurisdiction. This evidence was a deputation from the commissioners of the customs, who thereby "constituted and appointed *J. Phillips* to be *a* "*waterman in the port of* London, to do and perform "all things to the said office or employment belonging; "by virtue whereof he hath power to enter into any "ship, &c. or other vessel; and also in the day-time "with a writ of assistants under the seal of his majesty's "Court of Exchequer, and taking with him a consta-"ble, head-borough, or other public officer next inha-"biting, to enter into any house, &c. or other place "whatsoever, not only within the said port, but also "within *any other port or place whatsoever*, there to make "diligent search, &c., and in case of resistance to break "open any door, trunk, &c., or any other parcel or "package whatsoever, for any goods prohibited to be "exported out of, or imported into the said port, or "whereof the customs or other duties have not been "duly paid, and the same to seize to his majesty's use, "and to secure the same, &c. in all which premises he "is to proceed in such manner as the law directs," &c. This deputation, he contended, did not authorize *Phillips*, without the writ of assistants and the presence of a local

(*a*) The stat. 13 & 14 *Car.* 2. *c.* 11 *f.* 5. requires seizures of uncustomed goods to be made by authorized officers.

 public

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The King *against* Barfoot.

public officer, to feize the goods any where on fhore out of the limits of the port of *London*, as *Blackheath*, he faid, clearly was. And he denied that the ftat. 8 *Ann. c.* 7. or the ftat. 13 & 14 *Car.* 2. *c.* 11., which was alfo referred to at the trial, gave the officer a general authority to feize out of his limits.

The Court, however, were clearly of opinion (without hearing the counfel for the crown, *The Attorney-General*, *Garrow*, and *Roe*,) that *Phillips* had authority to make the feizure in queftion, by virtue of his general appointment as a cuftom-houfe officer, though defignated by the particular denomination of *waterman in the port of* London, and by virtue of the feveral acts giving cuftom-houfe officers authority to feize uncuftomed goods. That the deputation given in evidence did not confer and limit his power to feize in the particular inftance, but merely notified to the officer generally what he had authority by law to do, which authority was conferred by his appointment as cuftom-houfe officer and under the feveral acts of parliament conferring authorities upon fuch officers generally, by whatever name defignated. The defendant afterwards received fentence.

Saturday, May 18th.

Mowbray *against* Schuberth.

A defendant has the fame time to plead after the delivery of a bill of particulars as he had when the fummons for it was returnable.

UPON a rule for fetting afide interlocutory judgment for irregularity, with cofts, it appeared that the defendant, having had time to plead given till the 18th of *March*, obtained a fummons for a bill of particulars, which was ferved on the 11th of *March*, but when returnable did not appear. That the particulars were in fact delivered on the 27th of *April*, and judgment was

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MOWBRAY *against* SCHUBERTS,

figned for want of a plea on the 3d of *May*. For the plaintiff, it was contended by *Nolan*, on the authority of *Hifferman* v. *Langelle* (*a*), that an order for a bill of particulars does not fuspend the time for pleading; but if that be out, the plaintiff may fign judgment immediately, (or at moft, he faid, within 24 hours) after the delivery of the particulars. While *Reader*, for the defendant, infifted that the defendant had the whole time for pleading after the particulars delivered, as he had given him originally; which in this cafe would have extended beyond the 3d of *May*. But

The Court, after conferring with the Mafter as to the practice, faid, that the rule was that a defendant had the fame time to plead after the delivery of the particulars as he had when the fummons for the bill of particulars was returnable. In this cafe however the Court fet afide the judgment on payment of cofts, on an affidavit of merits.

(*a*) 2 *Bof.* & *Pull.* 363.

GLYN, Bart. and Another *againft* BAKER.

Tuefday, May 21ft.

The plaintiffs and the defendant having each lodged their refpective *India* bonds with the fame bankers, who afterwards privily and without the defendant's authority fold his bonds, and upon his demand of them delivered up to him the *India* bonds of the plaintiffs to the fame total amount, and payable to the fame obligee (being always the treafurer of the Company, who indorfes fuch bonds in blank before they are circulated), but having different numbers and for different feparate fums, and therefore manifeftly diftinguifhable from his own bonds; though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for thefe; held that the defendant having fold the plaintiffs' bonds fo received from his own agents, who had acted malâ fide in paffing them to him, was liable to anfwer over to the plaintiffs for the amount, in an action of affumpfit for money had and received to their ufe.

THE plaintiffs brought affumpfit for money had and received by the defendant to their ufe, as treafurers of the *Globe* Infurance Company; and at the trial before

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Glyn, Bart. *against* Baker.

Lord *Ellenborough* C. J. at *Guildhall*, a verdict was found for the plaintiffs for 3096*l.* 18*s.* 9*d.* ſubject to the opinion of the Court on this caſe:

Devaynes and Co. were bankers in *London*, with whom the *Globe* Inſurance Company banked, and were likewiſe in the habit of depoſiting ſecurities for ſafe cuſtody only. On the 28th of *April* and the 9th of *June* 1808 the company gave orders to *Devaynes* and Co. to purchaſe *India* bonds for them, which *Devaynes* and Co. accordingly did to the amount of 17,000*l.*, through the medium of brokers, whoſe notes of the numbers and other particulars of the bonds ſo purchaſed were handed over to the company, to ſhew that the order was executed; but the bonds themſelves remained in the hands of *Devaynes* and Co. to be kept till the company might call for them. Among theſe bonds were five of the following [redacted] nu[redacted]. 420. dated 31ſt *March* 1810 for 100[redacted] 221, 358, 545, [redacted] date, each for 500*l.* *Devaynes* and Co. had in [redacted] and *October* 1808 purchaſed for the defendant, (who alſo banked with *Devaynes'* houſe) *India* bonds in number 18 to the amount of 3500*l.* and delivered to the defendant the brokers' notes containing the numbers and other particulars of ſuch 18 bonds; but the bonds themſelves were left in the hands of *Devaynes* and Co. for ſafe cuſtody. Upon the 11th of *June* 1810 the defendant, being at the banking-houſe of *Devaynes* and Co., aſked for his bonds, the particulars of which were ſhewn to him from their books, and he ſigned a receipt for them, meaning to take them away; but did not: they had in fact been ſold by *Devaynes* and Co. in *September* 1809; though that fact was not communicated to the defendant,

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GLYN, Bart. *against* BAKER.

ant. On the 14th of *July* 1810 *Devaynes* and Co. received a letter from the defendant, dated *Barnstable*, 12 *July* 1810, in which he said, "I have to beg you "will send by post my *India* bonds cut in two; the "other halves to remain with you." Before the receipt of this letter, namely, in *September* 1809, *Devaynes* and Co. had sold the defendant's bonds, and by the post they sent to him, without the knowledge of the *Globe* Insurance Company, the halves of the five bonds abovementioned belonging to the company, inclosed in the following letter: "*London*, 14th *July* 1810. We re"ceived your favor of the 12th, and agreeably to your "request inclose you the halves of 10 *East India* bonds "amounting to 3500*l.* When you acknowledge the re"ceipt of them we will send you the other parts. "We have exchanged them for large ones, in order to "save postage." On the 17th of *July* 1810 the defendant acknowledged the receipt of these halves, and desired that the other halves might remain with *Devaynes* and Co. *Devaynes* and Co. became bankrupts on the 1st of *August* 1810; and after their bankruptcy they sent the remaining halves of the five bonds to the defendant, who sold them for the amount for which the verdict was taken. The defendant knew the numbers, as well as the dates, amounts, and letters of his own bonds, which differed in all these respects from those of the *Globe* Insurance Company; and the five bonds which he received were not indorsed by the *Globe* Insurance Company, or by any person on their behalf, or by *Devaynes* and Co., or any person, except the original obligee named in each bond. The form of an *India*

 bond

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bond was annexed to the case (*a*). If the plaintiffs were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

Taddy, for the plaintiffs, relied on the general principle, that the wrongful disposition by one person of the property of another does not devest the title of the original owner; which is exemplified by the exception in the case of sales in market overt (*b*), sustained only on the ground of the public notoriety of the transaction and for the sake of public convenience; and by the instance of agents having limited or special powers of disposition over the property of others, which if they exceed or vary from, the transfer is invalid. Therefore a factor cannot pledge the property committed to his disposal for sale. This rule holds in all cases, not specially excepted,

(*a*) No D. (8535.) £.100.
The United Company of Merchants of *England* trading to the *East Indies* do acknowlege to have received of *W. G. Sibley* 100*l.*, which the said company promise to repay to the said *W. G. S.*, his executors, &c. (by indorsement hereon), with interest for the same from the 31st of *March* last, after the rate of 4*l.* per cent., at the *East India house* in *Leadenhall-street*, *London*, on six months' notice to be given by the company in the *London Gazette*, or on six months' notice to be given by the said *W. G. S.*, his executors, &c. to the company's accountant in writing, at the *East India-house* aforesaid. For the true payment whereof, in manner aforesaid, the said company do hereby bind themselves and their successors in the penal sum of 200*l.* In witness whereof the said company have caused their common seal to be hereunto affixed, the 1st day of *April* 1788.

N°. D. (8535.) *J. H.*
Signed by order of the Court of
Directors of the said Company. (L. S.)
W. Richardson.
C. Cartwright.
(Indorsed with half-yearly payments of interest),
(Signed by *W. G. Sibley.*)
W. G. Sibley.

(*b*) 2 *Inst.* 713, 14.

where

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where the property of one person confided to the custody of another is in its nature distinguishable, or has an earmark; and the want of a distinguishing character is the ground on which Lord *Holt* says, in *Ford* v. *Hopkins* (*a*), "if money be stolen and paid to another, the owner of the money can have no remedy against him that received it. But (he adds) that if Bank-notes (*b*), Exchequer-notes, or Million-tickets, or the like, be stolen or lost, the owner has such an interest or property in them as to bring an action into whatsoever hands they are come." It was only by slow degrees that negotiable instruments, such as bills of exchange indorsed in blank, and deposited with bankers or agents, have been admitted (*c*) to pass the property by delivery to bonâ fide holders, without regard to the property of those who so pass them. But though *East India* bonds may in fact have obtained a circulation greater than other bonds, yet in their nature they are no more negotiable than the bonds of any individual: in a court of law the company are only liable to the obligee; and in his name only can the assignee of such a bond sue here: and certainly *Devaynes* and Co. had no authority from the plaintiffs to pass the bonds. [*Le Blanc* J. If the defendant's counsel mean to build any argument upon the negotiability in fact of these instruments, ought not the fact itself to have been stated in the case? Lord *Ellenborough* C. J. If it be meant to liken these to the case of bankers' notes, in *Miller* v. *Race* (*d*), as having acquired in fact a negotiable quality, and being received

(*a*) 1 *Salk.* 284.

(*b*) Bank-notes are now so far considered like common current money, without an earmark, that they cannot be followed by the original owners into the hands of bonâ fide holders for a valuable consideration, without notice. *Lowndes* v. *Anderson*, ante, 130. And vide *Solomon* v. *The Bank of England*, there cited, p. 135.

(*c*) *Collins* v. *Martin*, 1 *Bos.* & *Pull.* 649.

(*d*) 1 *Burr.* 452.

as

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GREEN, Bart. against BAKER.

as cash; or to ordnance debentures, notes, bills, and other securities of the same description, which are circulated daily in the money market; the fact of such negotiability should be stated. But supposing it were so stated, how could a right of action upon these securities be made to pass by such a practice to the holder of them, where by law no such right passes? There must always be that impediment existing to the legal negotiability of such instruments; which distinguishes them from bills of exchange and securities of that nature in which the legal interest passes, under the law merchant, by indorsement and delivery to another.]

Best, contrà, stated that the bonds of the *East India* Company were always made payable to their own treasurer, and were indorsed by him before they were issued; in which state they were afterwards negotiated, and passed by delivery from one to another.

LE BLANC J. It is clear that no action could be brought upon this bond but by *Sedley* the obligee, or in his name; or if he died, in the name of his executors. Here then are persons entrusted with the securities of *A.* and of *B.*, who part with the securities of *A.*, and when called on by him for them, give him the securities of *B.* That difficulty can only be met by assimilating such securities to cash, which, whether it has an earmark set on it, or not, if passed by the person entrusted with it to a bonâ fide holder for valuable consideration without notice, cannot be recovered by the original owner: but how does the similitude hold?

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BAYLEY J. Is there not another difficulty in the case? This defendant lodged his own bonds with *Devaynes* and Co., and knew that, as bankers, they had no authority to sell them; notwithstanding which, he received from them other bonds, not those which he had deposited with them, and which it turns out that they had no authority to part with. Is he not then concluded by the mala fides of his own agents? This was not a sale in market overt.

Taddy added, that even if the fact were found that such instruments were commonly negotiated, he should contend that they were not by law negotiable: and cited *Maclish* v. *Ekins* (a), where in trover for a navy bill, the original owner recovered it from the defendant who had

(a) *Sayer's Rep.* 73. I have a MS. note of the same case, under the name of *M'Lymb* v. *Ekins*, taken by Mr. *Short*, a cotemporary at the bar, which states that the plaintiff sent a general letter of attorney to *Todd*, his agent, "to uplift, settle, and adjust all accounts with the navy for him; to receive all freight due, and all profits belonging to the plaintiff as master of the ship; to contract, agree, or compound with the navy for his debts; to give acquittances for the plaintiff; and to do every thing, as if the plaintiff, who was the contractor, himself were present." [After the argument, in which it was contended that *Todd* had an authority coupled with an interest, which enabled him to pass the property in the bill: and also that the navy bill was to be considered as money:]

"LEE C. J. I was at the trial of opinion for the plaintiff, and it was with some difficulty I was prevailed on to make a case of it. I think there is no foundation from any rules of law to consider this as a property in the vendee by virtue of any authority given to *Todd*. It is said that this gives *Todd* not only a power but an interest too: but I think it can give him no power to receive the money on the navy bill, unless the navy bill was the same as a bank-note, which it never was considered as being like.

WRIGHT J. mentioned a case of *Davilla* v. *Herring* (1), in Lord C. J. *Pratt's* time, on a lottery order. *Todd*, on parting with the navy bill, warranted it; and it appeared on the assignment that he acted only as attorney. Judgment for the plaintiff per totam Curiam."

(1) Probably the same case as that mentioned in 1 *Stra.* 300. on a question as to the costs.

bought

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Glyn, Bart. *against* Baker.

bought it at a fair market price from one to whom it had been fold by *Todd*, the plaintiff's agent for fettling his account with, and receiving his balance from the commiffioners of the navy, but who had no authority from the plaintiff to difpofe of the bill.

Lord Ellenborough C. J. Does not the defendant at all events derive his title from a defective fource? He received thefe bonds as fubftitutes for his own from his own agents, who acted malâ fide in giving them to him: then the principal taking them through fuch agency muft take them with all the defects of title belonging to the agent. The defendant therefore cannot refift the action either in form or fubftance. Any individual might as well fay that he would make his bond negotiable.

Grose J. The defendant cannot hold this property without the confent of the true owner to the delivery.

Le Blanc J. Even if the cafe went to trial again to inquire into the fact of the negotiability of *India* bonds, the defendant would never be able to perfuade a jury to find that they were negotiable inftruments like bills of exchange.

Bayley J. If the defendant had gone into the market and bought thefe bonds without any knowledge of the defect of title in the perfon who fold them, that would have been a different cafe: but here he took them from his own agents, which agents knew that he had no authority to fell them.

Beft, for the defendant, acquiefced upon this expreffion of the clear opinion of the Court.

Poftea to the Plaintiffs.

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PASMORE *against* NORTH.

Tuesday, May 1st.

The indorsee of a bill of exchange, made payable 65 days after date, which was issued by the drawer, and indorsed by the payee, who died before the day when it bore date, may make title through such indorsement to recover on the bill against the drawer.

THE plaintiff, as indorsee, sued the defendant, as drawer of a bill of exchange, dated *Huddersfield*, 11th *May* 1810, whereby the defendant required *William Brook* and Co. *London*, 65 days after date, to pay to *Thomas Totty*, or order, 200*l.* value received, and place the same to account, as advised. At the trial in *London*, before Lord *Ellenborough* C. J., a verdict was found for the plaintiff for 233*l.*, subject to the opinion of the Court on the following case.

The defendant, *on the 4th of* May 1810, drew the bill in question, *dated the 11th*, and delivered it to *Totty*, the payee, who, after indorsing it for a valuable consideration to the plaintiff *on the 5th of* May, died *on the same day*. On the 12th the defendant sent to *Brook* and Co., the drawers, the following letter, signed by him. "*York*, 12th *May* 1810. "Gentlemen — On *Friday* the 4th instant I drew upon "you for 200*l.* in favor of Mr. *Thomas Totty*, bearing "date the 11th, at 65 days, and was paid to him in "advance for goods to be delivered afterwards. This "morning I am informed he lost his life by a fall from "his horse on the following day, the 5th; and under "the circumstances above-mentioned I conceive he "could not make a legal transfer of it, (although it is "probable he would pay it the next day at *Doncaster*,) "and to avoid the difficulty of getting refunded, I have "to desire you to decline the acceptance and payment "of it." The bill was duly presented for acceptance and payment; but *Brooke* and Co., in pursuance of the defendant's letter of the 12th of *May*, refused to accept or

pay

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PASMORE *against* NORTH.

pay it. On the 4th of *May* there was a balance due from *Totty* to the defendant of 70*l.* 9*s.* 9*d.*, and on the morning of that day *Totty* sent two waggon loads of malt to the amount of 124*l.* from his malting-house at *Stubb's-Hall*, 12 miles from *Wakefield*, and ordered his waggoners to deliver the same at the navigation warehouse at *Wakefield*, for the defendant's use; and the malt was delivered there accordingly about 12 o'clock of that day; but the navigation company never forwarded goods without a written order for that purpose from the party sending them. About 2 o'clock of the same day *Totty* applied to the defendant at *Wakefield* market to draw the bill in question, and promised to provide for the amount by malt or cash before the same should become due, and informed him that he had that morning sent two waggon loads of malt for the defendant's use, which would be delivered at *Wakefield* on that or the following day: whereupon the defendant drew the bill in question. Afterwards, in the course of the same day, *Totty* gave a written order at the navigation warehouse for the malt to be forwarded to *North* at *Huddersfield*: and the malt was accordingly forwarded to *Huddersfield*, and arrived there on the 10th of *May*, and the defendant paid the freight for the same. *Totty* had previously sold other parcels of malt to the defendant, which had been forwarded to him by the navigation from *Wakefield* to *Huddersfield*, and the defendant had always paid the freight. No other malt was sent, or other provision made for the payment of the bill. The defendant having refused to pay the amount of the bill to the plaintiff, this action was brought; and while it was pending the plaintiff on the 3d of *January* 1811 wrote this letter to the defendant: "Sir — Finding by my attorney notice has been given in

"the

" the action against you, as I understand from Mrs. *Totty* " you was indebted to the late Mr. *Totty* 130*l.*, of course " your bill was drawn for 70*l.* more than the goods re- " ceived. Now to save the expence of trial, which will " be very serious, I am willing to receive of you the " 130*l.* and get the remainder (70*l.*) of Mrs. *Totty*; you " paying half the expences at present incurred. As my " attorney is going off for *London* on *Friday* morning, " your answer by return will oblige, Sir, &c. *T. Pasmore.* *Doncaster*, 3d *January* 1811." To this letter the defendant wrote for answer, dated *Huddersfield*, *January* 4th, 1811, after acknowledging the receipt of the plaintiff's letter, that he had no objection to pay the plaintiff the balance he stood indebted in to Mrs. *Totty*. The plaintiff replied by letter of the 6th of *Jan.* 1811, that he had that morning sent a letter to Mrs. *Totty*, expressing what he had proposed to the defendant: that she had returned a verbal message, saying that she knew nothing what the defendant's account was, nor would she do any thing till the expiration of the time allowed by law: and concluded with the plaintiff's regret that it could not be settled. The question reserved was, Whether the plaintiff was entitled to recover any, and what sum? If he were entitled to recover, the verdict was to be entered for such sum as the Court should direct: if he were not entitled to recover, a nonsuit was to be entered.

Richardson, for the plaintiff, said that there were two questions, 1st. Whether the bill having been drawn and indorsed to the plaintiff before the day that it bears date, and the payee having died before that day, it was a negotiable instrument at the time, within the custom of

merchants,

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Pasmore *against* North.

merchants, so that the payee could convey a title to it by his indorsement to the plaintiff? And 2dly, If the plaintiff could sue on it at all, to what amount he was entitled to recover? 1st. The date of a bill, as of a deed (*a*), is in itself quite immaterial in respect of the obligation of the parties to it; for if a deed have no date, or a false, or impossible date, it takes effect from the delivery: the presumption of law is that it is meant to operate immediately, if no other period of operation be assigned by the terms of the deed itself. Here the date is no otherwise material, than as it serves to ascertain by reference the period at which the bill was intended to become payable, and whether it was antedated or post-dated can make no difference in this case, it being made payable 65 days after the actual date. In *Russell* v. *Langstaffe* (*b*) an indorsement written on a blank check was held to bind the indorser for any sum or time of payment which the party to whom it was entrusted chose to insert in it.

Lord Ellenborough C. J. The period at which the bill is payable appears in this case by reference to the actual date; and so far only it is material to advert to it. All that we have of statuteable recognition upon this subject is against the general materiality of the date: for the stat. 17 *Geo.* 3. *c.* 30. requires (amongst other things) that bills of exchange and promissory notes, &c. for sums of 20*s.*, and less than 5*l.*, "shall bear date before or at the time of drawing or issuing the same, and not on any day subsequent thereto;" which implies that the same regulation is not necessary to be observed in other bills for larger sums. Let us hear what objection the defendant's

(*a*) *Com. Dig.* 328. *Fait*, B. 3. (*b*) *Dougl.* 514.

counsel

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counsel makes to this bill: does he mean to say that it was in abeyance in the intermediate time between the issuing of it and the date.

Littledale for the defendant. The bill never had any operation by the custom of merchants, which does not apply to an instrument carrying a false appearance and deception upon the face of it. It was only meant to be taken as issued at the time of the date, and till that day it was not a negotiable instrument, however it might bind the drawer to answer for the amount to the payee or his executors. The indorsement then was with reference to the same time, and could not have had any legal operation till then; but before that time arrived the death of the payee destroyed the possibility of its ever becoming a negotiable instrument.

Lord ELLENBOROUGH C. J. What deception does the postdating hold out? Whoever takes the bill before the day when it bears date must see that it is only payable at 65 days after that date. A bill without any date would still be a good bill: then why is not this as good? The act to which I have referred directs that bills drawn for less than 5*l.* shall be made payable within three weeks after the date; which would have been futile, without prohibiting them to be postdated. The postdating of drafts upon bankers, unless drawn upon bill of exchange stamps, is by another act (*a*) prohibited under a penalty, and the draft made void: and this perhaps

(*a*) Vide 48 *Geo.* 3 *c* 149. *s* 12. In *Allen* v. *Keeves*, 1 *East*, 435. it was held that a draft on a banker post-dated, and issued before the day of the date, though not intended to be used till that day, required to be stamped by the stat. 31 *Geo* 3 *c* 25.

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may have led to the idea that this bill was void, to which the same objection does not apply. The time of payment in this case is certain with reference to the actual date.

The rest of the Court (*Grose* J. absent) agreed; *Le Blanc* J. adding, that the very party who now set up the defence, that this was not a negotiable instrument, was the person who issued it into the world as such. And they held that the plaintiff was entitled to recover for the whole amount of the bill; for which he took his judgment accordingly.

Tuesday, May 21st.

WALLACE and Others, Assignees of ANDERSON and EADES, Bankrupts, *against* BREEDS and Another.

Where a sale-note for the purchase of 50 tons of *Greenland* oil was delivered by the sellers' broker to the purchasers to be paid for by their acceptance, payable at a future day; and they afterwards received from the sellers an order on their wharfingers for the delivery of the 50 out of 50 tons of their oil; yet as the custom of the trade was for the casks to be searched by the sellers' cooper, and for a broker on behalf of both parties to ascertain the foot dirt and water in each (for which allowance was to be made,) and then the casks were to be filled up by the sellers' cooper at their expence; all which was to precede the delivery to the buyer: held that the sale was not complete to pass the property; but that the sellers, on the insolvency and subsequent bankruptcy of the buyers, before such acts done and delivery made, might countermand it.

IN trover for 50 tons of *Greenland* oil, a verdict was found for the plaintiffs for 2200*l.* at the trial before Lord *Ellenborough* C. J. at *Guildhall*, subject to the opinion of the Court on this case:

Anderson and *Eades* being traders and co-partners, on the 1st of *February* 1810, before their bankruptcy, purchased of *Heselton* and *Smith*, through their brokers *Day* and *Pierce*, 50 tons of *Greenland* oil, then lying at *Griffin's-wharf* in casks, at 44*l.* per ton, to be paid for by the buyers' acceptance at 4 months from the expiration of 14 days; and the following sale-note was thereupon de-

livered

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livered to *Anderson* and *Eades*. "Sold for *Heselton* and *Smith* to *Anderson* and *Eades* 50 tons of *Greenland* oil, at 44*l*. per ton, in casks, to be received at *Griffin's-wharf* in 14 days, and paid for by the buyers' acceptance at 4 months from the expiration of 14 days. Allowance for foot-dirt and water as customary. *Day* and *Pierce*, brokers. *February* 1st, 1810."

The defendants are wharfingers and co-partners, and carry on their business at *Griffin's-wharf*, where the oil purchased was lying. On the 13th *February* 1810 *Anderson* and *Eades* applied by letter to *Heselton* and *Smith* for an order of delivery of the oil; which order was given as follows: "Messrs. *Breeds* and *Farncomb*, *Griffin's-wharf*—Please to deliver to Messrs. *Anderson* and *Eades* 50 tons of our *Greenland* oil, ex 90 tons. *February* 15, 1810. *H.* and *S.*" The order was sent to the defendants' wharf, and received by their clerk in their counting-house on the 13th of *February*. On the 14th, *Anderson* and *Eades* being then in insolvent circumstances, the order was countermanded by *Heselton* and *Smith*, and at the time of such countermand nothing had been done upon the order: the oil remained in the same state as at the time of sale. The oil has since been delivered to *Heselton* and *Smith* by the defendants. On the 4th of *April* 1810 *Anderson* and *Eades* became bankrupts: shortly afterwards a commission was duly issued against them, under which the plaintiffs were chosen assignees, and on the 15th of *June* 1810 demanded the 50 tons of oil from the defendants. *Before* Greenland *oil is delivered, it is the constant custom to have the casks searched by a cooper employed by the seller; and it is also the custom for a broker, on behalf both of the buyer and seller, to attend to make a minute of the foot-dirt and water in each cask; and the casks are then filled*

up

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up by the seller's cooper at the seller's expence, and delivered in a complete state, containing the quantity sold; none of which circumstances had taken place at the time of the countermand. At the time of the sale and countermand *Heselton* and *Smith* had 90 tons of oil contained in 180 casks lying at the defendants' wharf. If the plaintiffs were entitled to recover, the verdict was to stand: if not, then a nonsuit was to be entered.

Scarlett, for the plaintiffs, contended that the property in the 50 tons of oil passed to the bankrupts, upon the order for delivery to them from the sellers, received by the defendants, the wharfingers, on the day before the countermand. He compared this to the case of *Whitehouse* v. *Frost* (*a*), where a similar order for delivery of 10 out of 40 tons of oil; the whole of which remained in the custody of the original owners; (which order was made by the former purchaser of the 10 tons, and was accepted by the original owners, but not measured out by them;) was held to pass the property to the sub-vendees of the 10 tons, who afterwards became bankrupts before the delivery. And he endeavoured to distinguish this from *Rugg* v. *Minett* (*a*), which was a sale of turpentine in casks, by auction, at so much a cwt.; where the casks were to be taken at a certain marked quantity; except the two last, out of which the seller was to fill up all the rest before they were delivered. There the property in the casks which were filled up was held to pass to the purchasers, notwithstanding they remained in the warehouse of the seller: but it was not held to pass in those casks which remained to be filled up by the seller, nor in the two last which were sold at uncertain quantities. But

(*a*) 12 *East*, 614. (*b*) 11 *East*, 210.

there

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there the price could not be afcertained till the cafks were filled up, the turpentine having been fold by the cwt.; nor as to the two laft cafks, till the actual meafurement of what remained after filling up the reft: the contract therefore was not completed, for want of afcertaining the quantity fold, which was to be done by the feller. Whereas here, the fale was of a fpecific quantity, and at a certain price; and nothing remained to be done to afcertain either the quantity (*a*) or the price; but only it was to be meafured out by the wharfingers, as in *Whitehoufe* v. *Froft* it was to be meafured out by the original owners, in whofe cuftody it remained. And as to the cuftom for the feller's cooper to fearch the cafks previous to the delivery of the oil; that cannot vary the quantity or price of it; and fo cannot affect the contract of fale; nor can the fubfequent allowance for foot-dirt water, which was to be afcertained by the common agent of the buyer and feller.

Lord ELLENBOROUGH C. J. The difference between this cafe, and that of *Whitehoufe* v. *Froft*, is that there nothing remained to be done by the feller in order to complete the fale as between him and the buyer: but here it is exprefsly found that fome things did remain to be done by the feller which were to precede the delivery to the buyer: the cafks were to be fearched by a cooper employed by the feller, and after the foot-dirt and water in each cafk were afcertained by the broker attending on behalf of both parties, the cafks were to be filled up by the feller's cooper at his expence, and delivered in a complete ftate, containing the quantity fold. Thefe were material acts to be done by the feller before the delivery

(*a*) Vide *Zagury* v *Furnell*, 2 *Camp. N. P. Caf.* 240.

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to the buyer: and the Courts have frequently laid hold of circumstances like these to retain the property in favour of the unpaid seller: and before the oil was measured out and these things were done, the delivery was countermanded.

The other Judges concurred in a judgment of nonsuit to be entered.

Parnther was to have argued for the defendants.

Tuesday, May 21st.

DOE, Lessee of STEWART, *against* SHEFFIELD.

Under a devise of land to "*the sisters*" of *J H.* (generally), their heirs, &c *as tenants in common*, and not as joint tenants, one of three sisters of *J H.* who alone survived at the time of the devise made, and who also survived the testator, is entitled to take the whole

But even if she had been only entitled to a part, (whether a moiety or a third,) the residue would not have gone to the heir at law, as in case of a lapsed devise; which supposes the deceased sisters to have been once capable of taking under the will; but to the residuary legatee, to whom was devised certain other lands, "and also all other the testator's lands, &c. not therein before disposed of, &c, and all other his real and personal estate whatsoever which he might be possessed of or entitled to," &c.

THIS ejectment was brought to recover one-third of freehold premises at *Newby*, in *Cumberland*; and at the last assizes for that county, a verdict was found for the plaintiff, subject to the opinion of the Court on this case:

Jacob Hind being seised in fee of the premises, by his will duly executed, dated 17th of *March*, 1802, "gave "and devised them unto the sisters of *John Howard*, to "hold the same, to them, their heirs and assigns for "ever, as tenants in common, and not as joint tenants." He also gave and devised unto *Joseph Scott* all that his freehold messuage and tenement at *Baldwinholm*, in the parish of *Orton* in the county of *Cumberland*; and also all other his messuages, tenements, and dwelling-houses, with their rights, members, and appurtenances, in *Ma-*

ryport;

ryport; and also all other his freehold messuages and tenements, lands, hereditaments, and premises, whatsoever and wheresoever the same might be, which he was in any manner entitled unto or interested in, *and not therein before disposed of*: also all his parts or shares of ships, &c.: also all his stock in trade, debts, &c. bonds, leases, mortgages, and all other securities for money; and all other his real and personal estate whatsoever, which he might die possessed of or any way entitled unto: to hold the same, to him, his heirs, executors, &c. for ever: subject nevertheless and charged (inter alia) with the payment of the debts and legacies thereby given and bequeathed, and particularly specified. And amongst other legacies, he gave and bequeathed unto *the children* of *Mary Stewart*, deceased, late wife of *John Stewart*, (father of the lessor of the plaintiff,) 250*l.* to be equally divided amongst them, share and share alike. And also bequeathed to *the children* of *Robert Mosley* 20*l.* to be equally divided amongst them, share and share alike. A copy of the will accompanied the case (*a*). Previous to the making of the will there had been *three* sisters of *John Howard*; but, at the time of making the will, one only, *Sarah* the wife of *Paul Dyson*, was living. The testator died seised on the 7th of *April* 1803, without issue; when *Paul Dyson* and *Sarah* his wife, the sole surviving sister of *John Howard*, entered into possession, and afterwards conveyed the premises in question to the defendant. The testator's father had two sisters, *Abigail Hind*, and *Mary Hind*, who, upon the death of the testator without issue, became his co-heiresses at law. The lessor of the plaintiff is the

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(*a*) Parts of the will, not originally inserted in the case, having been referred to by the Court, I have inserted those parts.

 grandson

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grandson and heir at law of *Abigail Hind*; and *John Howard*, mentioned in the will, is the son and heir at law of *Mary Hind*. The lessor of the plaintiff claims one-third of the premises in question as co-heir with *John Howard* of two-thirds thereof. The question was, Whether, under the above devise, *Sarah Dyson*, the sole surviving sister of *John Howard* at the time of making the will, was entitled to the whole of the premises devised, or only to one-third? And if to one-third only, whether the lessor of the plaintiff, as one of the heirs at law of the testator, was entitled to one-third, or *Joseph Scott* the residuary devisee? If *Sarah Dyson*, under the said devise, were entitled to one-third, and the heirs at law to the remaining two-thirds, the verdict was to stand: but if the residuary devisee were entitled to the said two-thirds, or *Sarah Dyson* were entitled to the whole, then a nonsuit was to be entered.

Littledale for the plaintiff. The first question is whether under the devise to *the sisters*, generally, of *J. Howard*, *Sarah Dyson*, the only surviving sister living at the time of making the will, was entitled to the whole, or only to one-third. By directing the sisters to take as *tenants in common*, and *not as joint tenants*, the testator manifestly intended that the three, who were once living, should take several estates or shares, which were not to go over from the one to the other. He uses the term *sisters* in the plural, which shews that he meant more than one to take. [*Le Blanc* J. The use of that term would be satisfied if he believed that *two* of them only were living: why then is it to be supposed that he intended *Sarah Dyson* to take a *third* only; why not *a moiety*?] No further facts could be collected than what are stated: but as there

there had been in fact three sisters, and it does not appear that he had been informed of the death of either, it must be presumed that he believed them all to be still living, and intended accordingly to leave this estate to them in thirds. 2dly. If the two-thirds were undisposed of, they would not go to the residuary devisee, because he was only to take what was "not therein before disposed of:" and the testator considered that he had before disposed of the premises in question to all the sisters of *J. Howard*, though it turns out that only one of them can take her share. The cases of *Wright* v. *Hall* (a), *Roe* v. *Fludd* (b), and *Doe* v. *Sheffield* (c), are in point against the residuary devisee, and in favour of the heir at law. *Sprigg* v. *Sprigg* (d), and *Jackson* v. *Kelly* (e), admit this to be the general rule as to the real estate. Here indeed there was no person to take at the time of making the will, which is the only distinction between this and the cases in *Fortescue*; but that cannot alter the effect of the devise to the residuary devisee; as the intention of the devisor, with respect to him, must be the same, whether the particular devisee were alive or dead at the time.

Paley, contrà, contended that the surviving sister of *J. Howard* took the whole estate; either assuming that the testator was ignorant of the real state of *J. Howard's* family, or upon the legal effect of the words of the devise. In the first view of the case, the testator could not have looked so much to the particular individuals as to the class of relations whom he meant to benefit; and such a general intent has, in many cases, been carried

(a) *Fortes.* 182. (b) *Ib.* 184. (c) *Willes*, 293.
(d) 2 *Vern.* 394. (e) 2 *Ves.* 285.

into

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into effect, notwithstanding a defective description of the persons who were to take under it. As in *Stebbing* v. *Walkey* (a), where the residue of stock was devised in trust "between the *two* daughters of *T. S.*, in equal shares, during their lives; and if either died, then to pay the whole to the survivor during life; and if both died, then the whole to fall into the residue:" *T. S.* having in fact *three* daughters, all were held to take equal shares. That was decided upon the authority of *Scott* v. *Fenhoulet*, in 1779, where a legacy was given to Captain *Compton* and each of his two daughters, if each or either should survive Lady *Chadwick*. And Captain *Compton* having more than two daughters, all were held to take equally. In *Garth* v. *Merrick* (b) there was a bequest of a residue to the testator's *six* grandchildren by name; but the name of one of them was repeated, and that of another omitted; yet all took equal shares. In *Tonkyns* v. *Tonkyns* (c) four children were let in, though the bequest was to three only. But considering it, not as a case of mistake, but on the legal effect of the words, they must be read "sister or sisters," or "such sister or sisters of *J. H.* as shall be living at the time of my death." As where in *Viner* v. *Francis* (d), one bequeathed money to the children of his late sister, &c, with the residue over; and at the date of the will there were three children living, one of whom died in the life-time of the testator; the two survivors were decreed to take the whole. The Master of the Rolls considered that the testator meant that the children of his sisters who were living at his death should take the whole;

(a) 2 Bro. Ch. Rep. 85.
(b) 1 Bro. Ch. Rep. 31.
(c) Cited 2 Ves. 260.
(d) 2 Bro. Ch. Rep. 658.

which

which would equally have held, though one only had survived. Then, considering the case in that view, it comes within the decision of *Crooke* v. *Brooking* (a), which was money bequeathed after *A. C.*'s death, to go amongst *her sister's children* as she should advise. The sister had six children at the death of the testator, but only one child living at the death of *A. C.*, who died without leaving any directions: and it was held that the surviving child should take all. The direction of the testator in this case, that the sisters should hold as tenants in common, could only be taken to apply, if there were more than one, to regulate the succession between them: such words have no effect where cross remainders are implied. If two of the sisters had survived, it cannot be doubted but that they would have taken the whole: and yet that would equally destroy the argument that each of the three sisters were intended to take distinct estates. By the subsequent bequests of sums of money to be divided between *the children* of *Mary Stewart*, and *the children* of *Robert Mosley*, the testator also shews that he did not regard the individuals so much as the several families, classes, or descriptions of legatees; which argument of noscitur a sociis had weight with Sir *Thomas Clarke*, Master of the Rolls, in *Loveday* v. *Hopkins* (b). If the surviving sister do not take the whole, the difficulty which the Court have suggested arises, as to what part she is to take; for it cannot appear whether the testator knew of the death of the two others or only of one. But 2dly, If she only took one-third, the residuary devisee would take the remaining two-thirds, and not the heir at law. The cases cited in favour of the heir were all cases of lapsed devises by the death of the particular

(a) 2 *Vern.* 106. (b) *Ambl.* 273.

devisee

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devisee in the lifetime of the testator: and in *Morris* v. *Underdown* (a), one of the rules for ascertaining when the heir should take is, "that where a testator in his will has given away all his estate and interest in certain lands, so that if he were to die immediately nothing would remain undisposed of, he could not intend to give any thing in those lands to his residuary devisee." Then the converse of that must hold in favour of the residuary devisee: and here it is clear that if the testator had died immediately after making his will, and the then surviving sister only took one-third, there would have been a residuum of the other two-thirds undisposed of: and therefore they would go to the residuary devisee, to whom the residuum is given in the most ample words.

Littledale, in reply, as to the question whether the surviving sister should take the whole, distinguished this from the cases cited by *Paley*, as concerning real and not personal estates: and even in the latter case, the Master of the Rolls said, in *Stebbing* v. *Walkey* (b), that he only yielded to the authority of the cases, and not to the reason of them. *Crooke* v. *Brooking* (c) was also a case of personal estate. Here there could have been no cross remainders; and therefore that argument does not bear against the heir. Next, as to the share the surviving sister should take; whether a moiety or only one-third? Strictly she is only entitled to one-third, that being according to the true state of the family at the time of the devise; but taking it more favourably for her, with reference to the last state of the family, which the testator

(a) *Willes*, 297. (b) 2 *Bro. Ch. Rep.* 86. (c) 2 *Vern.* 106.

tator, consistently with the use of the word *sisters*, might have had in his view, she would at most be entitled only to half.

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Lord Ellenborough C. J. Though no case has been cited which in terms corresponds with this, yet, looking at the will itself before us, I have little doubt in saying that the testator intended to devise his estate to the several objects of his bounty in classes; taking the chance of there being a greater or less number of persons in each class; and meaning that if there were more than one individual of the same description, they should all take equal shares; if only one, that one should take the whole given to that class or description. He begins by devising the premises in question to the first class of persons whom he meant to favour, by the general description of "the sisters of *John Howard*:" the probability is that he did not know precisely whether there existed at that time one or more persons of that description; for he mentions no one nominatim. The same observation applies to the subsequent distribution of his personal estate to other objects of his bounty: he names none, but speaks generally of *the children* of *Mary Stewart* and of *the children* of *Robert Mosley*, to whom he bequeaths certain sums to be equally divided amongst them, share and share alike: and yet there is no doubt but that if only one of each class had been living at the testator's death, that one would have taken the whole of what was bequeathed to the same class. It was so held in *Crooke* v. *Brooking*, in 2 *Vernon*. We may therefore take it as the canon of this testator's intention, that he regarded the objects of his bounty, as he has described them, generally, in classes. It cannot then be disputed

but

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but that *Sarah Dyson*, the surviving sister of *John Howard*, at the time of making the will and at the decease of the testator, must take some portion of the devised premises; and if she be not entitled to the whole, what part is she to take; a third, or the half? Supposing there had been ten sisters originally, and some of them had died, were the rest to have taken only each a tenth; or could he have meant that the class should have less when reduced to one only? The scope of the will shews that he looked to the class, and not to the number of individuals who might happen to compose it. Then *Sarah Dyson*, the only surviving sister at the time of the testator's making his will, and at his death, who then represented the whole class, must take the whole estate devised to her class. But even if *Sarah Dyson* were not entitled to take the whole, the heir at law could not be entitled to any part of the residue undisposed of: for this is not the case of a lapsed legacy; but the residuary devisee is to take "all other his lands, hereditaments, and premises whatsoever and wheresoever, *not therein before disposed of*, &c., and all other his real and personal estate whatsoever," &c. in the most comprehensive terms. Then admitting the law to be as stated in the cases cited on the part of the heir at law, with respect to lapsed legacies; this is not a lapsed legacy. A devise is said to be lapsed where the devisee dies in the intermediate period between the making of the will and the death of the testator: but here the only existing person, capable of taking under this description in the will at the time of making it, continued to exist after the testator's death. When therefore the testator gave to the residuary devisee all his real estate not before disposed of, he meant to give him all that he had not before given to the sister or sisters of *John*

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Howard. In either way then of confidering the will, the plaintiff is not entitled to take: either the furviving fifter, reprefenting the whole clafs of "the fifters of *John Howard*," would take the whole eftate; or if not the whole, the refidue which fhe did not take would go over to the refiduary devifee.

GROSE J. concurred in the fame opinion.

LE BLANC J. The leffor of the plaintiff cannot fucceed on either ground. It is clear that the teftator in devifing the premifes to "the fifters of *John Howard*," generally, ufed the term *fifters* to denote that *family* as it was at the time of making the will, which is the time to look to. There was then only one fifter living: before that time there had been three, but two had died. And that has thrown a difficulty on the plaintiff's counfel to fhape his argument, in contending what portion the furviving fifter fhould take; whether a third, or a moiety. Under this general defcription, if there had been other fifters of *John Howard* born after the making of the will, who were living at the time of the teftator's death, all would have fhared the benefit of the devife (*a*). Whether there was a capability of more being born at the time of making the will does not appear by the ftate of the cafe: but the cafes cited fhew that the Court will conftrue the collective words, *fifters*, *children*, &c., as denoting the *family*, fo as to take in one and all who fall

(*a*) Vide *Garbland* v. *Mayot*, 2 *Vern*. 105. *Cook* v. *Cook*, *ib* 545. *Weld* v. *Bradbury*, *ib*. 705. *Stanley* v. *Baker*, *Moor*, 220.; and *Bateman* v. *Roach*, 9 *Mod*. 104. Where a limitation over has been to *children*, generally, it has been held to include fuch as had come in effe after the teftator's death, and before the limitation over took effect. Vide *Ellifon* v. *Airy*, 1 *Vef*. 114. and *Baldwin* v. *Karver*, *Cowp*. 309.

under

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under those respective descriptions. But on the other point also, it would be clear that if the surviving sister did not take the whole, the property undisposed of would pass in this case by the residuary devise: for supposing it not to go to the only surviving sister, it was not disposed of at all at the time of making the will; and then it would pass as the residue not before disposed of in the will to the residuary devisee. Therefore this is not like the case of a lapsed legacy, which supposes a legatee once capable of taking under the will, but dying before he could take. Besides, the words of the residuary devise in this case are much stronger than merely passing what was *not before disposed of*; for after those words, the will (*a*) proceeds "and all other his real and personal estate whatsoever which I may die possessed of or anyways entitled to:" those words mark the intention of the testator more strongly even than the first words. But if it had rested on the former words only, I should have thought that all that did not pass to the surviving sister would go to the residuary devisee.

Bayley J. I agree that the surviving sister is entitled to take the whole. It is said that the testator contemplated to divide the estate between the three sisters, and that each should only take one-third in severalty, without the benefit of survivorship: but that does not appear; for it is left to "the sisters," generally, not by name: and it is not even stated that the father and mother of *John Howard* were dead; and if not, there might have been more sisters of *John Howard* born after the making of the will. If indeed the property had been left to

(*a*) These words, which were read from the will, were not originally inserted in the case.

them

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them by name (*a*), as tenants in common, no doubt if one of them had died before the teſtator, her ſhare would have gone over: but where it is left to perſons, generally, under the claſs or deſcription of *ſiſters*, *children*, or the like; and there may be additional ſiſters, children, &c. after the will is made; there, whoever anſwers the deſcription at the death of the teſtator will take under ſuch a deviſe. If, in caſe the deviſe had been to the three ſiſters as joint tenants, all three being living at the time when the will was made, and two of them had died before the teſtator, ſtill the ſurviving ſiſter would have been entitled to the whole (*b*); and if a deviſe to *ſiſters*, generally, be conſidered as attaching on ſuch as anſwer to the deſcription at the death of the teſtator; I do not ſee how the want of knowledge by the teſtator of the death of the two at the time of making his will, which the argument for the plaintiff ſuppoſes to have been the fact, ſhould prejudice the ſiſter who alone ſurvived at that time. Then, as to the other point; ſuppoſing the ſurvivor not to take the whole; if in fact the teſtator had not diſpoſed of the reſidue, though he might think that he had, it would paſs to the reſiduary deviſee under the words of the deviſe to him.

A nonſuit to be entered (*c*.)

(*a*) Vide *Page* v. *Page*, 2 *P. Wms*. 489. and 2 *Stra*. 820. and *Man* v. *Man*, 2 *Stra*. 905.

(*b*) Vide *Cart*. 4. and 3 *Boſ*. & *Pull*. 16.

(*c*) Vide 1 *Rep*. 100. in *Shelly*'s caſe. "The rule of law is that if an eſtate be limited to two, the one capable, and the other not capable; he who is capable ſhall take the whole; all the caſes are agreed in 17 *Ed*. 3. fo. 29. and 18 *Ed* 3. 59. If a man give land to one et primogenito filio; if he hath no ſon, the father takes the whole." This ſuppoſes a *joint* eſtate limited to the two. Vide *Edleſtone* v. *Speake*, 1 *Show*. 91. It is otherwiſe if *ſeveral* eſtates be limited to two *by name*.

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Tuesday, May 21st.

OWSTON *against* OGLE.

Part-owners of a ship having agreed "Each and every of them with the others and each and every of the others," that the ship should proceed on a certain voyage, *under the exclusive management and control of one of them as ship's husband*; and that after her return "a *full account should be made of the said ship and her concerns*," and the *neat profits* be divided in proportion, *after deducting all charges*; the duty of making out such account is cast upon the ship's husband; and for not doing so, and not dividing the neat profits after deducting all charges, within a reasonable time after the ship's return, an action lies against him upon the agreement by each of the part-owners; though it be not averred in terms that the charges were or could have been ascertained before the action brought; for that is matter of defence.

THE plaintiff declared upon a special agreement in writing, dated 17th of *April* 1809, made between himself and the defendant, and several others by name, part-owners of a ship; whereby *they and each and every of them did agree to and with the others and each and every of the others*, among other things, that the ship should proceed on a voyage to the *West Indies*, and should be *under the exclusive management and control of the defendant*, as husband thereof, without any interference; that he might repair, fit her out, and supply her with all such stores as he thought expedient for the said voyage; and that each of the parties should, on the defendant's request, advance and pay him a proportion of all sums he might think necessary to be expended, &c.; and that all losses, charges, and expences should be borne by all the parties in like proportion. And that after the ship returned from her voyage *a full account should be made out of the said ship and her concerns*, and the neat profits should be divided according to the proportions in the said ship, after deducting all charges and expences. The declaration then, after stating mutual promises to perform, alleged, that in pursuance of the agreement, the ship proceeded on her voyage to the *West Indies*, and returned on the 1st of *September* 1809, and was during all the time under the exclusive management and control of the defendant, as husband thereof, without any interference: that the defendant repaired and fitted her out, and supplied her with stores for the voyage, and afterwards received the proceeds of the voyage, and that the neat

neat profits thereof amounted to 4000*l.*; and that the plaintiff's proportion, as part-owner, amounted to 100*l.* 8*s.* 3*d.*: of all which the defendant had notice. And it was then and there *the duty of the defendant, as husband of the said ship, to make out a full account of the said ship and her concerns*, and to divide and cause to be divided the neat profits, according to the proportions in the said ship, after deducting all charges and expences: yet, that the defendant had not made out a full account, or any account at all, of the said ship and her concerns *in the said voyage*; nor had he divided *the neat profits* in the said ship, *after deducting all charges and expences*; although the defendant was requested so to do, and a reasonable time for that purpose has long since elapsed. There was a second count to the same effect, only stating the agreement to be made between the plaintiff and defendant, and other persons, not naming them. To these the defendant demurred, and assigned these special causes of demurrer: 1. That the plaintiff and defendant were, with certain other persons, part-owners and partners in the ship, and that the action is brought *on a partnership account* relating to it. 2. That other persons were jointly interested in the agreement, who ought to have sued *jointly* with the plaintiff, and that the plaintiff ought not to have sued *alone* for the alleged breach of the agreement in not making out a full account of the ship and her concerns. 3. That it does not appear by the agreement that it was the duty of the defendant to make out a full account of the ship and her concerns, and to divide the neat profits according to the proportions in the ship, after deducting all charges and expences. 4. That by reason of any duty relating to a partnership in the ship, independent of the agreement, the

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OWSTON *against* COLE.

defendant is not liable to an action at law. 5. That it does not appear that by reason of the defendant's having been ship's husband in one voyage, it was his duty to make out a full account of the ship and her concerns, which might comprehend accounts of several voyages. 6. That it does not appear that the defendant had the means of making out a full account of the ship and her concerns, and of dividing the neat profits; or that the costs and charges of the ship and her concerns were ascertained so as to be deducted. 7. That the defendant was not bound to divide the neat profits *of the said profits*, and did not agree to do the same; although he might be bound and have agreed to divide the neat profits of the ship and her concerns.

F. Pollock, in support of the demurrer, first relied on the objection, that it appears upon the face of the declaration, that there are other persons who possess a *joint* interest with the plaintiff in the subject-matter of this agreement, the breach of which is complained of, and who therefore ought to have joined in this action against the defendant as ship's husband, for not accounting; supposing he was answerable at all for the breach as alleged. As in *Eccleston and Wife, Executors of Castle*, v. *Clipsham* (a), it was held, that though a covenant be joint *and several in the terms of it*; yet if the interest and cause of action be *joint*, the action must be brought by all the covenantees. A joint and several covenant must be understood to be joint wherever the interest is joint, and several where the interest is several. Now here, as between the ship's husband and the other persons interested in the adventure, until the account was taken

(a) Saund. 153.

and

and the several shares of each ascertained, there were no several interests, but only one joint interest; there was only to be one account, not several accounts; and all were alike interested in the statement of the account to be made. [Lord *Ellenborough* C. J. Each might have a several interest in the making out of the account by which his share was to be ascertained, before an actual division made of the profits of the adventure? The covenants are not only several in the terms of the instrument, but it appears to me that they were meant so to be. *Le Blanc* J. In the case cited there was clearly a joint damage.] As to all the rest of the world these parties were clearly joint tenants and partners till an actual division was made. Upon covenants of this kind it is usual to make out only one general account, which is submitted to the inspection of all.

1811.

OWSTON *against* OGLE.

Lord ELLENBOROUGH C. J. Each of the adventurers was to derive from the ship's husband the account of the ship's proceedings; what had been disbursed, and what she had earned; in order that he might have the means of ascertaining the amount of his own share. Is it not then reasonable that the covenant to account should be several? There could indeed be no account of the neat profits, nor could any division of the neat profits be made, until the period arrived when the charges and gains of the voyage were ascertained; but before that division was to be made, each would be entitled to have an account; and whether usual or not, it is very reasonable that he should. The object of the covenant seems to have been to prevent a suit in equity.

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Owston *against* Ogle.

Bayley J. If the covenant to account were not several, then the ship's husband shewing the account to any one of the adventurers would be an answer to an action for not shewing it to any other, and all the others might remain in ignorance of it.

2d Objection. That though the declaration alleges that it was the duty *of the defendant*, as ship's husband, to make out the account, yet the agreement itself stated does not import so much: it only states that "a full account should *be made out*;" but it does not require this to be done by the defendant. A bill in equity, or an action of account, would be the proper remedy, and not this action. The declaration should at least have charged, that in consideration that the defendant was ship's husband, he had engaged to make out an account; but the terms of the agreement impose no such duty on him.

Lord Ellenborough C. J. The duty results from the whole of the agreement. The person who was to have the exclusive management of the concern, and who alone could have the information necessary for the purpose, must be the person, who, in the contemplation of the parties, was to make out the account; and that is the defendant, the ship's husband.

3d Objection. A difference is made in the declaration between an account of the proceeds *of the voyage*, and of the ship and her concerns, *generally*; but the agreement does not impose any such general duty on the defendant, but only in respect of the voyage in contemplation.

Lord

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OWSTON *against* OGLE.

Lord ELLENBOROUGH C. J. The concerns of the ſhip muſt be taken to be with reference to the voyage. As between the parties to this agreement, the ſhip had no concerns but with reference to the voyage. *Le Blanc* J. It is ſo limited in the terms in which the breach is laid.

4th Objection. It is not averred that the charges and expences were or could have been ſettled at the time of the action brought; without which the account could not be made out, nor the neat profits aſcertained or divided.

Lord ELLENBOROUGH C. J. The *neat profits* muſt mean after all charges and expences deducted: the plaintiff claims no more: the ſhip's huſband has been ſtruggling to evade the duties impoſed on him by the agreement.

Per Curiam, Judgment for the Plaintiff.

Abbott was to have argued for the plaintiff.

1811.

Tuesday, May 21st.

WRIGHT and Another *against* The Inhabitants of the Lath of ST. AUGUSTINE, in the County of KENT.

In following up a writ of execution to its consummation, under the statute of Hue and Cry, 8 *Geo.* 2. *c.* 16., which the subsequent statute of the 19 *Geo.* 2. *c.* 34. refers to and adopts as the mode of proceeding in case of a penalty recovered by the executor of a revenue officer kill d in the pursuit of smugglers, against the inhabitants of the hundred (or of a lath in *Kent*,) it is sufficient for the sheriff, to whom the writ had been delivered, to return, even after the expiration of 60 days given him by the act to return the writ, that he had delivered it to the justices of the peace of the hundred, &c. (who are charged with the duty of directing the levy on the inhabitants,) and that they had done nothing upon it: and the Court will not thereupon attach the sheriff for not returning the writ; but the next proceeding is against the magistrates, to oblige them to do their duty.

THE penalty of 100*l.* having been recovered (*a*) in this action of debt, upon the stat. 19 *Geo.* 2. *c.* 34. *s.* 6., by the executor of a revenue officer, who was killed in the pursuit of a smuggling boat by a shot fired from the shore; and that statute directing that the damages and costs recovered should be levied by the ways and means and in the manner and form prescribed by the statute of Hue & Cry, 8 *Geo.* 2. *c.* 16.; proceedings were taken to levy the amount accordingly. The 4th section of the stat. 8 *Geo.* 2. enacts, that in case the plaintiff (in the action against the hundred) shall recover judgment, "no process of execution shall be served on any "particular inhabitant of the said hundred, or any fran-"chise within the precinct thereof, nor on the said high "constable; but the sheriff, or his officer, shall upon "the receipt of any writ of execution to him directed "in pursuance of the said judgment, (instead of serving "the said writ on any inhabitant) cause the same to be "produced and shewn gratis unto two justices of the "peace of the county, riding, or division, (one of

(*a*) This was spoken of as the same cause which had come before the Court on another point; vide *Grosvenor*, *Executor of Ellis*, v. *The same Defendants*, 12 *East*, 244.; but no explanation was given as to the difference of names.

"the

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WRIGHT *against* The Inhabitants of The Lath of ST. AUGUSTINE, KENT.

" the Q.) and residing within the said hundred, or near " unto the same; who shall thereupon with all convenient speed cause such taxation and assessment to be " made, and to be levied and collected in such manner " as is prescribed by the stat. 27 *Eliz.* *c.* 13. &c. And " the sums of money so to be levied and collected shall be " paid over and delivered by such officer or officers, as by " the said statute of *Elizabeth* are to levy and collect the " same, within ten days after such collection, to the " sheriff of the county wherein the robbery shall happen, to the use of the plaintiff in such action," &c. By the 5th section, the money so paid to the sheriff is to be delivered over by him to the party entitled, without fee or deduction whatsoever. And by *s.* 6. " that sufficient time may not be wanting for such taxation and " assessment to be duly made, and for the money to be levied and collected thereupon, after such writ of execution shall be shewn to such justices, and before the " sheriff shall be obliged to make a return thereof; no " sheriff shall be required to make any return to any " such writ, &c. until after the expiration of 60 days " next after the day whereon such writ shall be delivered " to the said sheriff, who is required to indorse on the " back thereof the day on which he received the same." In this case the writ had been delivered to the sheriff of *Kent*; and more than 60 days having elapsed without any levy made, the sheriff was ruled to return the writ; and he returned, that he had delivered the writ gratis to the justices of the peace (*a*), &c., and that they had as yet done nothing upon it.

The Attorney-General thereupon now moved for an attachment against the sheriff; contending that the statute

(*a*) The jurisdiction of the cinque ports, within which the fact happened, has an exclusive commission of the peace.

meant

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WRIGHT against The Inhabitants of The Lath of ST. AUGUSTINE, KENT.

meant to throw upon him the task of putting the magistrates in motion to levy the money as required by the act, and not upon the plaintiff in the action, who was only directed to look to the sheriff for the receipt of the money; however hard it might be upon the sheriff who had no ordinary control over the magistrates, but must apply to this Court to compel them to proceed. [*Le Blanc* J. The statute has not pointed out what method the sheriff is to use with the magistrates to aid the execution of the writ. *Bayley* J. Is not this like the case of a writ issued in the first instance to the sheriff which is to be executed in a particular liberty: the sheriff's return of mandavi ballivo, qui nullum dedit responsum, is sufficient as to him.] The legislature seems to have given the sheriff so long a time as 60 days to make his return, for the purpose of giving him time to set the magistrates in motion: but if he were not to be responsible at the end of that time, but the plaintiff in the action was to look to the execution of the writ by the magistrates; considering the sheriff as a mere instrument to hand it over to them and not to be further responsible; the legislature would rather have given an earlier day than usual to the sheriff to make such a return as he has now made.

Lord ELLENBOROUGH C. J. The law having imposed on the sheriff the necessity of acting through the medium of certain magistrates over whom he has a very imperfect control; it would be too much for the Court to punish him for the neglect of others. The duty of the sheriff in the first instance is to hand over the writ to the justices of peace, and to put them in motion as far as he can. This he has done. If the next set of persons charged with the execution of the writ be negligent

gligent in the duty impofed upon them; upon a proper cafe made out againft thofe perfons, we fhould act upon them as the cafe required: but it would be too hard to vifit their neglect upon the fheriff. You may proceed againft them by an application for a mandamus, or by a more penal courfe, if the cafe will warrant it, and you fhall be fo advifed.

Per Curiam, Rule for an attachment againft the fheriff refufed.

JUDGE *againft* MORGAN and Another.

Tuefday, May 21ft.

In an action for malicioufly, &c. arrefting and holding the plaintiff to bail, in which the declaration, in fetting out the judgment by default in the former action, ftated that "it was thereupon confidered that the then plaintiffs fhould take nothing by their faid writ, but that they *and their pledges to profecute* fhould be in mercy," &c.; it is no material variance if the record produced in evidence have not the words *and their pledges to profecute*, but only have an &c, for thefe words may be rejected as furplufage, the fubftance of the allegation being the difcontinuance of the former fuit.

THIS was an action on the cafe againft the defendants for malicioufly, and without reafonable or probable caufe, arrefting and holding the plaintiff to fpecial bail for 340*l*. upon a writ fued out of this court; in which the declaration, after ftating that fuch proceedings were had in the faid fuit, that the then plaintiffs (the now defendants) were ordered by the Court to enter the iffue before joined therein on a certain day, and that the fame day was given to the then defendant (the now plaintiff), averred that the then plaintiffs, though called, came not, but made default at that day, and did not enter the faid iffue fo joined in the faid fuit: "and thereupon it was confidered by the faid Court of B. R. that the then plaintiffs fhould take nothing by their faid writ, but that they, *and their pledges to profecute*, fhould be in mercy, and that the then defendant fhould go thereof without day, &c.: as by the record and proceedings thereof, &c.

1811. JUDGE against MORGAN.

&c. more fully appear; and the said action was and is thereby wholly ended and determined," &c. The judgment-roll when produced in evidence at the trial before Lord *Ellenborough* C. J. at *Guildhall* had not the words "*and their pledges to prosecute*;" but in the place thereof was an &c.; and for this variance the plaintiff was nonsuited.

Burrough (with *Jervis*,) moved in the last term to set aside the nonsuit, contending that this, being no substantial variance as to the matter in issue, might be rejected as surplusage. It was enough to say in effect that the former suit was ended; and the plaintiff having said more than was necessary or material would not hurt. He referred to the year-book 7 *H*. 4. 1. *pl*. 6., and *King* v. *Pippet* (*a*), citing *Hendray* v. *Spencer* (*b*).

Comyn (with *Park*,) now shewed cause against the rule. All material allegations must be proved (*c*); and here it was material to shew the discontinuance of the former suit by the judgment of nonsuit; of which the award of the Court, that the plaintiffs *and their pledges to prosecute* should be in mercy, is a material part, the want of which is not aided by stat. 16 & 17 *Car*. 2. *c*. 8. (*d*). [*Bayley* J. Is it of any consequence whether or not they were amerced, if they took nothing by their writ? Lord *Ellenborough* C. J. If there were any proceeding against

(*a*) [illegible] 298.

(*b*) Sittings at *Westminster* after *Mich*. 1773, before Ld. *Mansfield* C. J.

(*c*) *Bristow* v. *Wright*, *Dougl*. 642.

(*d*) This statute says that "judgments shall not be stayed or reversed "for default of form or lack of form; or by reason that there are not "pledges, or but one pledge, to prosecute returned upon the original "writ, &c. nor any judgment after verdict shall be reversed for want "of misericordia," &c.

against pledges it might be material: but is there any case to shew that the award of judgment against the pledges is material? Could a party now demur for want of pledges?] The record produced did not appear to be the same judgment stated, by reason of the variation; the allegation therefore was not proved.

Lord ELLENBOROUGH C. J. The allegation in the declaration was laid larger than in the record produced; though the record produced had an &c., which if expanded might be the same in form. I think I laid more stress upon the objection at nisi prius than I ought to have done. There was no materiality in the variance.

Per Curiam, Rule absolute (*a*).

(*a*) Vide *Roberts* v. *Price*, 1 *Ld Raym.* 702.

Ex parte EDWARD BOGGIN.

Friday, May 24th.

A carpenter belonging to a vessel employed in the coal and coasting trade is not exempted from being impressed by any statute now in force.

DAMPIER moved for a rule to shew cause why a writ of habeas corpus should not issue to the captain of his majesty's ship *Roebuck* to bring up the body of *E. Boggin*, who had been impressed on the 12th of *April* last from the *Ceres*, a coal vessel of 224 tons, belonging to *North Shields*, on board of which he was *carpenter*, and had been such since the 9th of *February*, and which vessel was then in *Yarmouth Roads* upon her coasting voyage. There was the usual affidavit that the applicant had not entered, &c. since his impressment. He referred to a case, which was lately before the Court, where they had considered

1811.

Ex parte Boggin.

considered that the captain (*a*) of a trading vessel was not a proper subject of the impress service. This applicant, he admitted, had not quite so strong a claim for exemption; though from the necessity of his occupation on board a ship of this burthen, his claim was considerable, and was recognized by the legislature in the stat. 2 & 3 *Ann. c.* 6. *s.* 20., though not now an existing law. The statute provided that during the then war, there should be allowed yearly, free from impressing, to every master of any vessel employed in the coal trade, *beside* the said master, and master's mate, *and carpenter*, one able seamen for every 100 tons burthen, &c. and imposes a penalty on any officer impressing men so allowed.

Lord Ellenborough C. J. There might be an implication drawn from that act, in favour of the master's exemption, which does not apply to the others named; for if the master, who was to be the nominator (*b*) of the seamen to be exempted, were not himself exempt from

(*a*) This was the case of one *Chalacombe*, the master and part owner of a vessel in the coal and coasting trade, which came before the Court in last *Hilary* term. *Jervis*, as counsel for the Admiralty, in shewing cause against the issuing of the writ, represented that general directions were given, as a matter of grace and favour, not to press seafaring persons of this description; though he denied that they had any exemption of right. Lord *Ellenborough* C. J. said—considering it merely as a question of discretion, is it not more fit that this should stand over for the consideration of the Admiralty, to whom the matter ought to be disclosed? This is a most useful and highly meritorious service; and it is not discreet that a right of this kind should be pushed to the extreme. (After some hesitation expressed, his Lordship added—) As it is a question of great public importance, let the writ go, and the officer may make what return he shall be advised.

The case was never discussed again; for the Lords Commissioners of the Admiralty, on being apprized of the matter, and upon some special circumstances which had occurred after the writ issued, by which the execution of it was, by mistake of the officer at the port where the man was, delayed for a few days, ordered *Chalacombe* to be discharged.

(*b*) This seems to have been by the st. 6 & 7 *W.* 3. *c.* 18. *s.* 19. which in *Gallile*'s case, 7 *Term Rep.* 623. was held to be no longer in force.

being

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Ex parte [illegible].

being impressed, there might be no seamen nominated. It rather seems however that those persons were only exempted by force of the act; and that being expired, the exemption has ceased.

BAYLEY J. If a carpenter in the coal trade were to be exempted on general grounds, the same exemption would extend to carpenters in every maritime trade.

Per Curiam, Rule refused.

BURMESTER *against* HILCH.

Saturday, *May* 25th.

Rule refused, to permit the defendant to pay into court the debt and costs up to a certain day after the action brought, (thereby excluding the costs of the declaration delivered;) upon the ground of an offer to pay the debt and costs up to that period, without having made a tender before action, or obtaining the common rule for staying proceedings on payment of debt and costs up to the time of the application.

THIS was a rule calling upon the plaintiff to shew cause why the defendant should not be at liberty to pay into court 38*l.* 10*s.* upon the first count of the declaration, (in assumpsit for wages earned on board a ship,) with the costs of the action to the 30th of *April* last inclusive; and why the plaintiff should not pay the costs subsequent to that time, if he accepted that sum in full of the damages for which the action was brought: and if he did not accept it, then why that sum should not be struck out of the declaration under the usual rule; and in the mean time proceedings be stayed. It appeared by the affidavits that the defendant having been arrested upon a bill of *Middlesex*, returnable the 1st of *May*, for 102*l.* made no objection to the debt to the amount of 38*l.* 10*s.*, and by letter from his attorney to the plaintiff's attorney on the 30th of *April*, offered to pay the full sum for which this and another action had been brought, being in this action 38*l.* 10*s.*, and also the costs to be taxed up to that time; but no actual tender was made: [illegible] offer was rejected; a larger sum being then claimed; and a declaration was delivered in

1811. BURMEISTER *against* ...

this action on the 14th of *May*, with notice to plead in four days. And after an ineffectual application to a judge at chambers to stay the proceedings on payment of 38*l.* 10*s.*, and costs up to the 30th of *April*, the defendant pleaded the general issue; and then this rule was obtained.

Hullock opposed the rule as introductive of a new practice to supply the place of a regular tender, and to supersede the common rule for paying money into court on the usual terms.

Taddy, in support of it, mentioned an instance of a similar rule obtained in this court in *Zwartewal* v. *Cowell and Another*, *M.* 50 *Geo.* 3.; and in the court of C. P. in *Roberts* v. *Lambert* (*a*): and said that the money could not have been paid into court before the declaration delivered.

Lord ELLENBOROUGH C. J. I see no reason for adopting a new rule of practice for subdividing the period for paying money into court, and constituting a new stage of proceeding; unless we saw clearly in the particular instance some contrivance or vexation on the part of the plaintiff. The defendant might have tendered the sum, admitted to be due, before action brought; and then he might have pleaded the tender, and paid the money into court: but having missed that period, he might, after the action brought, have applied in the usual course to stay the proceedings on payment into court of the sum due, and costs to that time: and that he has not done.

(*a*) 2 *Taunt.* 283.

GROSE

GROSE J. declared himself of the same opinion. 1811.

BURMESTER against HILGEN.

LE BLANC J. This practice would introduce great uncertainty and vexation to the plaintiff. After an action brought, a sum might be tendered to the plaintiff's agent in town, who would not perhaps be apprised of the exact state of his client's demand in the country; and then he must either stay his proceedings till he could be satisfied of it, which in many cases might answer the defendant's purpose of delay, or he must proceed at the risk of loosing his subsequent costs by an application of this kind: and therefore, without a strong case made out to shew an intentional vexation and view to enhance expence on the part of the plaintiff, there seems to be no ground for the Court to interfere out of the ordinary course.

BAYLEY J. The only inconvenience that can ensue in such a case as this is the additional costs of the declaration; but that would not necessarily overbalance the inconvenience of the new mode of proceeding now proposed

Rule discharged.

1811.

Saturday, May 25th.

Bell *against* Byrne.

An action for a libel, charging in one count that the defendant published it as purporting to be a letter from *A.* to *B.*; and in another charging generally that the defendant published the libellous matter, is not sustained by proof of a publication, wherein the defendant stated that in a debate in the *Irish* House of Commons, several years before, the Attorney-General of *Ireland* had read such a letter; and then stating the libellous matter *as said by him*, in commenting upon the letter: for the characters of the several libels are essentially different, though the slander imputed may be the same.

It seems also that a libellous assertion that the plaintiff "*has been for some time past* confined on a charge of high treason," taken as a fact asserted generally by the publisher on his own knowledge, would refer to the period of the publication, and therefore would not be proved by shewing that it was asserted to have been said by another some years before, and consequently referring to the period when it was so said.

But proof of a warrant, to arrest *on suspicion* of high treason, will not sustain a justification that the plaintiff was arrested and confined on a charge *of high treason*.

THIS was an action on the case for a libel upon the plaintiff, contained in the *Morning Post* newspaper of the 15th of *May* 1810; and in the first count the defendant was charged with having printed and published the libel on the plaintiff "*as and purporting to* "*be a letter written from* A. *to* R. O'C., viz.: I "(meaning the said *A.*,) have sold all my property "to *B.*; yet it may still go on in my name; and the "rents are to be transmitted to *Hugh Bell*, Esquire, "40, *Charterhouse-square*; (meaning the plaintiff.) Mr. "*Bell* (meaning the plaintiff,) *has been for some time past* "*confined in* England *on a charge of high treason*." The three next counts also charged the libel to be printed and published by the defendant *as and purporting to be a letter written from* A. *to* R. O'C. The 5th and 6th counts stated, generally, that the defendant, *on the day and year aforesaid*, published the libellous matter following, of and concerning the plaintiff; viz., Mr. *Bell* (meaning the plaintiff,) has been *for some time past* confined in *England* on a charge of high treason: concluding with an averment, negativing the fact of the plaintiff's having ever been confined in *England* on a charge of high treason.

The defendant pleaded the general issue of not guilty; and also two several justifications: 1st, That be-

fore

fore the time mentioned in the declaration, the plaintiff had been confined in *England* on a charge of high treason. 2dly, As to the libels stated in the 5th and 6th counts, that before the publication of them, and also before the union of *Great Britain* and *Ireland*, to wit, on the 19th of *February* 1799, a motion had been made in the *Irish* House of Commons respecting the discharge of *R. O'C.*, then being in custody; and upon that occasion a debate arose and took place in the said House of Commons; and his Majesty's then Attorney-General for *Ireland* spoke against the discharge of the said *R. O'C.*, and in the course of his speech stated to that House that Mr. *Bell* (meaning the plaintiff,) had been for some time past confined in *England* on a charge of high treason: and then the defendant averred that he published a true account of that debate; in the course of which account the supposed libel occurs. To these justificatory pleas the plaintiff replied de injuriâ suâ propriâ, absque tali causâ.

At the trial before Lord *Ellenborough* C. J. at the sittings in *London*, the plaintiff proved the publication of the libel in question in the defendant's newspaper of the 15th of *May* 1810; which was part of a long paragraph or statement, the direct and professed object of which was a comment upon the conduct and views of other persons than the defendant, whose name appeared to be introduced only collaterally to the principal subject of discussion. The libellous matter complained of was prefaced by several political reflections on the conduct of several persons whose names were mentioned; (not including the defendant's,) the liberation of one of whom was the subject of the *Irish* debate. And

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then it proceeds: "The ſpeech of the Attorney-Gene-"ral, in which this expoſure is ſo clearly made, and "which we ſubjoin, will be found highly intereſting, and "well worthy of the moſt ſerious attention; inaſmuch "as it not only eſtabliſhes all the facts we have from time "to time ſtated, but from one of the letters read leaves "no doubt whatever," &c. Here it reſumes the attack upon the conduct of the perſons before alluded to. Afterwards it profeſſes to give the Attorney-General's ſpeech; in which certain letters were ſtated as read by him: in one of which, from *A.* to *R. O'C.*, the words occur, as ſtated in the firſt count, under the date of "*London, February* 13, 1798," viz.: "I have ſold "all my property to *B.*; yet it may ſtill go on in "my name, and the rents are to be tranſmitted to *Hugh* "*Bell*, Eſq., 40, *Charterhouſe-ſquare.*" After which immediately followed the libellous words in queſtion, without any parentheſis or brackets to diſtinguiſh them from the letter, in the middle of which they were printed,—"Mr. *Bell* has been for ſome time paſt confined in *England* on a charge of high treaſon." And the firſt queſtion was whether theſe latter words were meant to be ſtated by the publiſher of the paper as part of the letter aſſerted to be read by the *Iriſh* Attorney-General in the debate, or as a running comment by the Attorney-General in his ſpeech on the reference to the plaintiff's name in that letter. The ſenſe of the thing, compared with the context, was, upon a particular and accurate inveſtigation of the whole, ultimately conſidered by the Court now as eſtabliſhing the latter; but this was conſidered to be doubtful upon the firſt peruſal of it at the trial: and therefore, when, upon the aſſumption that that ſenſe could alone be put upon the libellous matter,

an objection was then endeavoured to be raised, that the four first counts could not be supported, which charged the publication of the libellous matter as purporting to be contained in a letter from *A.* to *R. O'C.* The Lord Chief Justice said that he was not then sufficiently satisfied of it, but would let the case go to the jury; reserving however, on account of the doubt, the benefit of the objection to the defendant's counsel, upon a motion in court for entering a nonsuit. Then other objections were taken, which applied to the two last counts, which charged the defendant with having stated, generally, that the plaintiff had been for some time past confined in *England* on a charge of high treason; first, that the proof was not of an assertion by the defendant of the fact of the plaintiff's having been so confined; but an assertion by him that the Attorney-General of *Ireland* had said so; which was altogether a different kind of libel. Next, that the charge, as stated in the 5th and 6th counts, must be taken to refer to the period "for some time past," immediately antecedent to the publication of the libel, namely, "on the day and year aforesaid," which refers to the 15th of *May* 1810, the day of publication before-mentioned in the declaration: whereas the libel proved evidently referred the period of the plaintiff's supposed confinement in *England for some time past*, on a charge of high treason, to a time past antecedently to the speech of the Attorney-General in *Ireland*, by whom the fact was imputed to have been asserted, namely, before the 19th of *February* 1799. These objections were also overruled at the trial for the present, with liberty to move the Court upon them. And the defendant then went into his defence; when he proved the apprehension of the plaintiff upon a warrant from the Duke of

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Portland, then Secretary of State, in *March* 1798, *on suspicion* of high treason; which Lord *Ellenborough* C. J. held not to be sufficient proof of the first justification, that the plaintiff had been before confined on a charge *for high treason*: and no evidence being adduced of the fact of the *Irish* Attorney-General having stated what was alleged in the second justification, (the statement being said to be copied from an *Irish* newspaper at the time,) the whole case went to the jury upon the libel, who found a verdict for the plaintiff, with 500*l.* damages.

A rule was obtained by *Curwood* in the last term for setting aside the verdict and entering a nonsuit, upon the grounds of the several variances stated between the charges alleged in the four first, and in the two last counts, and the evidence adduced in support of them; or for a new trial, on the ground of excessive damages. But when the matter now came on again, this latter ground, after an intimation from the Court that it could not probably be sustained, was abandoned: and the argument was confined to the questions of variance between the counts in the declaration and the proof.

Topping, *Raine*, and *Courtenay*, Jun. shewed cause against the rule; and argued first upon the fact, that the libellous matter appeared in the print as if stated to be part of the letter represented to have been read by the *Irish* Attorney-General in the debate, and not as a running comment of his own upon such letter. The Court however afterwards decided the fact against them; as it appeared upon the face of the paper proved by the plaintiff

tiff at the trial, in evidence of the libel. That got rid of the four first counts. Then, in answer to the objection on the two last counts, that libellous matter asserted as a fact by the publisher was different from the same libellous matter asserted by the publisher to have been spoken of the plaintiff by another person; and that proof of the one did not support an allegation of the other: they argued that in whatever shape the assertion was made, whether as a fact within his own knowledge, or as coming from another, the libellous assertion was equally his own, and he was answerable for it: that the pretending that it was spoken by another must be taken to be mere colour, unless the defendant justified and proved the words to have been spoken by another, as he alleged. That by publishing the slander he made it his own; and the more so in this case, on account of the prefatory part of the libel, which appeared to adopt, as the writer's own sentiments, that which was afterwards stated by him as the sentiments and assertions of another.

The Attorney-General, *Curwood*, and *Tindall*, observed, with respect to the four first counts, that it was plain that the libellous matter relating to the plaintiff was stated as the comment of the *Irish* Attorney-General on the letter he was reading in the *Irish* House of Commons, and not as contained in the letter itself: for the letter describes Mr. *Bell* as *then* residing at No. 40, *Charterhouse-square*; and therefore the writer could not say that he was *then* confined on a charge of high treason. Then as to the two last counts, alleging the publication of the libellous matter generally; it is stated that the defendant published *on the day and year aforesaid*, that the plaintiff had been *for some time past* confined in *Eng-*

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land on a charge of high treaſon; which "*ſome time paſt*" muſt mean with reference to the day and year of the publication of the defendant's paper, namely, the 15th of *May* 1810: but the fact in proof is that the defendant publiſhed an account of what the *Iriſh* Attorney-General had ſaid *ſeven years before*, that Mr. *Bell* had *for ſome time paſt* (which muſt neceſſarily mean for ſome time *then* paſt) been confined, &c.: the variance as to the day in this caſe (which in general is immaterial) eſſentially varies the fact alleged as to the time when it happened. And again, it is a very different thing whether a perſon aſſerts a fact on his own knowledge and authority, which is the manner in which the libellous matter is alleged in the two laſt counts; or whether he ſtates it on the authority of another, naming at the ſame time his authority. The difference is eſſential both as it regards the libeller and the perſon libelled: as to the latter, the authority of the perſon vouched may either add weight to the libellous charge, or do away all probable effect of it: as to the former, if the defendant had been correctly charged, as he ought to have been, with having publiſhed the libellous matter as part of the ſpeech of the *Iriſh* Attorney-General in parliament, it would have been a competent juſtification to him to have pleaded and ſhewn that the Attorney-General did make ſuch a ſtatement in parliament, and that what was publiſhed was a true report of it. If another action were brought for the ſame libel, alleging the fact truly, a verdict and judgment in this caſe could not be pleaded in bar to ſuch action.

Lord ELLENBOROUGH C. J. I have heſitated in forming my ultimate opinion on this caſe, in conſequence of the manner in which the ſubject had been preſented to

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my mind by the argument of the plaintiff's counſel, connecting the libellous matter, in the mode in which it is ſtated, with the introductory part, in which the publiſher ſeemed on his own aſſertion to give a reality and a ſubſtance to the letter and facts ſo ſtated to have been read and declared, independent of the ſuppoſed aſſertion of the *Iriſh* attorney-general. For I have now no difficulty in ſtating, that upon an attentive review of the publication, the libellous matter is not ſtated as part of the letter of *R. O'C.*, but as part of the ſpeech of the *Iriſh* Attorney-General in commenting upon it. The manner therefore in which the libel is alleged in the four firſt counts, as part of the letter, is clearly not a true deſcription of it; which diſpoſes of thoſe counts. But on the other point, on which I heſitated at the trial, and which I reſerved for further conſideration, how far the connexion of the libellous matter with the introductory part would ſupport the general form in which it is laid in the two laſt counts; I do not think on further conſideration that the publiſher meant to make a ſubſtantive allegation of his own reſpecting the libellous fact ſtated of the plaintiff, but only with reference to the ſpeech of the *Iriſh* Attorney-General, aſſerting that the latter had made ſuch a declaration. If the defendant had undertaken to repeat the ſlander as a fact contained in a certain letter, I ſhould have thought that he had made it his own, and that the general allegation in thoſe two counts was made out: but I find that all through the publication it is given as the ſpeech of the Attorney-General, *in which will be found, &c.*; not taking upon himſelf to ſay that any ſuch letter or fact did exiſt or had happened.' Therefore, though it might ſtill have been charged as a libel, the queſtion is whether it is a libel of ſuch a character

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racter as it is here charged to be? The true description of the libel should have been, that the defendant purported to publish a speech of the Attorney-General of *Ireland*, in the House of Commons, &c., in which was contained the libellous matter, &c.: and it is not a true description to state that he published the libellous matter generally, as upon his own assertion of the truth of it. I have therefore come to a conclusion satisfactory to my own mind, that the defendant was entitled to a nonsuit at the trial.

Grose J. The libellous matter charged is referred in the publication to the speech of the *Irish* Attorney-General, and therefore is not truly described in any of the counts of the declaration; and the difference is material.

Le Blanc J. All the counts either state that the defendant published a letter containing the libellous charge, or that he published the libel as a substantive allegation of his own: and unless the plaintiff makes out one or other of those allegations, he cannot sustain his declaration. Whether the slander is in writing or in words, it is equally the subject of an action, if he assert the matter as from himself, or says that it was asserted or written by another; yet it varies the character of the libel both as to the manner of charging and of defending it, according as it is published in the one form or the other. It is equally libellous in either way, but it is a different libel. It was material therefore whether the libel contained a substantive allegation that *R. O'C.* wrote a letter containing the libellous assertion, or that the *Irish* Attorney-General had said so. It appears clearly however,

however, upon reading the publication, that it refers to the speech of the Attorney-General, of which it purports to give an account: and that appears even from the libellous passage itself: for it could not be part of the letter that Mr. *Bell* had been *then* for some time past confined in *England* upon a charge of high treason. The next question is whether this was a substantive allegation of the fact by the defendant himself? The whole refers to the speech of the *Irish* Attorney-General, as after-stated. And it is not within the 6th count; for if it were laid as the defendant's own allegation, that the plaintiff had been *for some time past* confined on a charge of high treason; that would refer to the time of the publication: whereas on the face of the publication itself it evidently refers to an antecedent period, when the *Irish* Attorney-General had said so. The evidence therefore did not sustain either of the counts.

BAYLEY J. The question is not whether the declaration might not have been so framed as to entitle the plaintiff to recover upon the facts proved at the trial, but whether he has or has not made out in proof that which he has stated in this declaration. It is a very different thing to assert a fact as in the party's own knowledge; and to say that another, whom he names, has told him so: the persons who hear the one must conclude that the party pledges his own knowledge of the fact; which in the other case they do not. The distinction is taken between the two by Lord *Kenyon* in one of the cases (*a*). Now here the plaintiff takes upon himself in the four first counts to prove that the libel purported

(*a*) Vide *Davis* v. *Lewis*, 7 *Term Rep.* 17. referring to Ld. *Northampton*'s case, 12 *Rep.* 133, 4.; and *Maitland* v. *Goldney*, 2 *East*, 426.

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to be contained in a letter from *A.* to *R. O'C.*: but the libel proved does not ſtate that there was any ſuch letter containing ſuch a charge, or that the writer pledged his own knowledge of there being ſuch a letter; but only that the Attorney-General in *Ireland* had aſſerted the fact of the plaintiff having been confined, &c. And the introductory part of the libel ſtill refers to the fact as ſtated by the Attorney-General "from one of the letters read," &c. There is no aſſertion by the defendant that the letter ſo read was a genuine letter, or that he pledged his knowledge of there being ſuch a letter containing the libellous charge. Still leſs is the general allegation made out, that the defendant had aſſerted that the plaintiff had been for ſome time paſt confined in *England* on a charge of high treaſon: for looking at the paper it only appears that the defendant had ſtated that the Attorney-General of *Ireland* had ſaid ſo. Now, though it may be libellous to ſtate that another perſon ſaid ſuch and ſuch things of the plaintiff; and in ſome caſes it may be an aggravation of the libel to ſtate it in that way; yet ſtill it is a different libel; and the charge is open to a different defence.

Rule abſolute.

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Monday, May 27th.

The usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, *he or they paying freight for the said goods*, is introduced for the benefit of the master only, and not for the benefit of the consignor; and therefore the master is not bound to the consignor to with hold the delivery of the goods unless the consignee or his assigns pay the freight. Nor does it vary the case that the consignor was also the charterer of the ship.

Therefore where the master covenanted in a charter party to proceed with certain goods from *London* to *Tangiers*; there to apply "to the correspondents' factors, or agents of the charterer for orders, whether he was to proceed to *St. Lucar* or *Cadiz*; and that pursuant to the orders he would make *a right and true delivery to the correspondents factors or agents* of the charterer *agreeably to bills of lading*; and the charterer covenanted that he would pay to the master *immediately* on a right and true delivery of the cargo in full for the freight of the ship at a certain rate in sterling money; and afterwards bills of lading were signed and delivered, making the cargo deliverable *at Tangiers and St. Lucar* to *J. P.* (the charterer's agent at *Tangiers*) or his assigns, *he or they paying freight for the said goods*, so much in sterling money, *at the current exchange at Cadiz on London*; and the master was ordered by *J. P.* at *Tangiers* to deliver the cargo *at Cadiz* (by which it was averred that the master was prevented from delivering the same to any of the correspondents, factors, or agents of the charterer *at Tangiers or St. Lucar agreeably to the bills of lading*;) and did deliver it *at Cadiz* to *B. P.* the *agent of the defendant in that behalf*, according to the charter-party: the master, who had not received the freight from *B. P.* on delivery of the cargo to him, was held entitled to recover it from the charterer, in an action of covenant upon the charter-party.

For neither the fixing of the rate of exchange in the bills of lading varies this from the common rule above mentioned; nor the omission in the bill of lading of going to *Cadiz*, which was named in the charter-party together with *Tangiers* and *St. Lucar*; for such omission only relieved the master (who was to deliver agreeably to the bills of lading) from going to *Cadiz*; but did not take from him the power of going there under the charter party. And again, *B. P.*, who was only averred to be *the agent of the charterer*, is either to be considered as virtually the *assign* of *J. P.*, to whom or to whose assigns the bill of lading required the delivery to be made; or *J. P.* must be taken, in default of making any appointment, as having refused to accept the cargo; and then the master properly delivered it to *the agent of the charterer and consignor himself*, so as to found the action of covenant on the charter-party.

THIS was an action of covenant upon a charter-party, made the 26th of *March* 1808, between the plaintiff, therein described to be master of the *American* ship *Hopewell*, then lying in the port of *London*, and the defendant, a merchant of *London*; which witnessed that the plaintiff let the *Hopewell* to freight to the defendant for the voyage and upon the terms and conditions following. First the plaintiff covenanted that the vessel should be made tight, and be sufficiently manned, victualled, apparelled, and provided, &c. for the intended voyage; that he would receive on board not exceeding

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160 hhds. of tobacco from the defendant, his agents or assigns; and being despatched therewith would sail from the port of *London*, and proceed directly to *Tangiers*; where he would *apply to the correspondents, factors, or agents of the defendant for orders*, and wait for the same 15 days, *whether he was to deliver the said cargo at that port, or proceed therewith to* St. Lucar *or* Cadiz; and that having received such orders the plaintiff would *pursuant thereto* make *a right and true delivery to the correspondents, factors, or agents of the defendant* of the whole of the said cargo of tobacco *agreeably to bills of lading*; and upon such delivery and discharge to end the voyage, (the act of God, &c. and all other unavoidable casualties excepted). In consideration whereof the defendant covenanted for himself and his assigns, &c. not only to ship on board the vessel in the port of *London* a complete cargo of tobacco in hhds., and receive the same out of her at *Tangiers, St. Lucar*, or *Cadiz*, (giving notice to the plaintiff at what port the cargo was to be discharged within 15 days after the vessel's arrival at *Tangiers*,) within the time limited, and days of demurrage, &c.; but also that he would pay to the plaintiff or his assigns, *immediately on a right and true delivery of the said cargo in full for the freight of the said ship* for the said voyage, at the rate of 3*l.* 13*s.* 6*d.* *British* sterling per hhd. received out of her, together with 10*l.* per cent. on the amount of the said freight for primage, and 30 guineas as a gratification to the plaintiff. The plaintiff then averred that the ship was made tight, and sufficiently manned, &c. for the voyage; and that on the 2d of *May* 1808, after making the charter-party, he received on board of her at *London* from the defendant 135 hhds. of tobacco; and that he signed bills of lading for the same as follows.

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[Here the bill of lading was set forth, dated *London*, *May* 2d, 1808, by which it appeared that the ship was "*bound for* Tangiers, *and from thence to* St. Lucar;" and that the 135 hhds. shipped were "to be delivered at the aforesaid port of *Tangiers* and *St. Lucar*," "unto Mr. "*John de la Piedra*, or in his absence to his Catholic "Majesty's consul-general at *Tangiers*, or to their assigns, "*he or or they paying freight for the said goods*, 3 guineas "and a half for each cask, 10*l.* per cent. primage, and "30 guineas gratification; the whole at the current ex-"change at *Cadiz* on *London*, with primage and average "accustomed." Signed by the plaintiff.] That those were the bills of lading referred to in the charter-party, and that no others were signed for the delivery of the cargo. That the plaintiff having received the said cargo of tobacco on board, and being despatched, sailed with the said vessel directly from *London* to *Tangiers*; and being arrived there on the 6th of *June* 1808, applied to the said *John de le Piedra*, the correspondent and agent of the defendant in that behalf, for orders, whether he should deliver the cargo at that port, or proceed therewith to *St. Lucar* or *Cadiz*; and the plaintiff was then and there *ordered by the said* John de la Piedra *to proceed with the cargo to* Cadiz; and by means of the several premises aforesaid, the plaintiff was prevented from making a right and true delivery of the same to any of the correspondents, factors, or agents of the defendant *at Tangiers* or *St. Lucar*, *agreeably to the said bills of lading* in that behalf: but the plaintiff, having received such orders aforesaid, pursuant thereto proceeded with the ship and cargo *to* Cadiz; and afterwards, on the 13th of *July* 1808, did *there* make a right and true delivery of the whole of the said cargo, *agreeably to the orders and di-*

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rections of one Benito de la Piedra, *the agent of the defendant in that behalf*, according to the form and effect of the *charter-party*: and thereupon ended the said voyage. Of all which premises the defendant afterwards had notice, &c. And then the plaintiff proceeded to allege a breach of the defendant's covenant in the charter-party by non-payment of the stipulated freight, &c. to his damage of 700l.

To this the defendant pleaded, amongst other pleas, that the plaintiff ought not to maintain his action, because the plaintiff, not regarding *the said bill of lading and the said charter-party*, delivered the said tobacco, *without receiving the said freight, and gratification, primage, and average, according to the said bill of lading*, or having the same secured to him in any manner whatsoever, as he ought to have done; by reason whereof, and by and through the default of the plaintiff, the said freight, primage, average, and gratification, to be paid according to the said bill of lading, have been wholly lost. To this there was a general demurrer.

This case was argued on a former day in the term by *Puller* for the plaintiff, and by *Scarlett* for the defendant: but the points of the case and the authorities cited were so fully discussed by the Court on giving judgment, that it is not necessary to state the arguments.

Lord ELLENBOROUGH C. J. This was an action of covenant upon a charter-party, whereby the plaintiff agreed to carry a cargo of tobacco, and deliver the same to the correspondents, factors, or agents of the defendant, agreeably to bills of lading; and the defendant covenanted

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venanted to ship the tobacco; to receive it either at *Tangiers*, *St. Lucar*, or *Cadiz*, giving notice within fifteen days after the ship's arrival at *Tangiers*, at which of those places the said cargo was to be delivered; and on right and true delivery, agreeably to bills of lading, to pay or cause to be paid certain stipulated freight. The cargo was loaded, and bills of lading signed for delivery *at Tangiers* and *St. Lucar* to *John de la Piedra*, or in his absence *to his Catholic Majesty's consul* at *Tangiers*, *or their assigns*, *he or they paying certain specified freight*, (being the same as that mentioned in the charter-party,) at the current exchange at *Cadiz* on *London*. The ship arrived at *Tangiers*: application was made to *John de la Piedra*, to know whether the delivery was to be there or at *St. Lucar* or *Cadiz*: orders were received from him to deliver *at Cadiz*: the cargo was accordingly delivered at *Cadiz to the defendant's agent there*; but the freight was not paid. And the questions which have been made on the part of the defendant are three; First, Whether the plaintiff was warranted in delivering the cargo to the defendant's agent, *without first obtaining from him the freight?* Secondly, Whether he was warranted in going to *Cadiz* at all, (*Tangiers* and *St. Lucar* being alone mentioned in the bills of lading,) and in making a delivery *there?* And thirdly, Whether he had any right to deliver *to the defendant's agent there*; he being, as was contended, a stranger to the bill of lading? The first is the chief and most material question; and it depends upon the effect of this clause in the bill of lading, "*he or they paying freight for the said goods.*" If this clause were introduced with a view to the defendant's security, and made it incumbent upon the plaintiff, at his peril, to look to the consignee under the bill of lading for payment of the freight, the plaintiff

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plaintiff had no right to deliver to the defendant's agent, without first receiving such payment; and his delivery, without payment, was in that case not "a right and true delivery." But if this clause were introduced for the plaintiff's (the master's) benefit only, and merely to give *him* the option, if he thought fit, to insist upon his receiving freight abroad before he should make delivery of the goods, he had a right to wave the benefit of that provision in his favour, and to deliver without first receiving payment; and he is not precluded by such delivery from afterwards maintaining this action. And the latter seems to us the true construction of this contract. The case of *Penrose* v. *Wilkes*, *Abbott's Law of Merchant Ships*, (3d edit.) 276. is, according to the account of it there given, nearly in point. According to that account, there was a charter-party and bills of lading, as here, and the bills of lading imported that the goods were to be delivered to a third person, *on his payment of the freight*. They were in fact delivered to him without such payment. Lord *Kenyon*, at Nisi Prius, at first held that he could not sue the charterer for the freight, on the ground that he ought not to have delivered the goods without having the freight paid; and accordingly nonsuited the plaintiff: but the Court afterwards, upon a motion for a new trial, thought his opinion wrong; and a new trial was ordered, in which the plaintiff succeeded. Mr. *Holroyd* has furnished the Court with the briefs in that case, and they nearly agree with Mr. *Abbott*'s statement. The bills of lading were to the defendant *Wilkes or his assigns, he or they paying freight*; and the defendant indorsed them specially to *Richard Kymer* and Co., on condition only that that they would accept, or in writing promise to accept, certain bills, and would also promise in like manner to

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account with *Rowlett, Corp*, and Co., to whom half the cargo of tobacco belonged, for one moiety of the proceeds of the tobacco; and on refusal by *Kymer* and Co. so to account or to promise to account, and so to account to *Rowlett, Corp*, and Co. for one moiety of the proceeds, then to deliver the tobacco to *Dewhurst* and Co.; first obtaining from them a similar promise in writing to accept the bills and to account to the defendant for a moiety of the proceeds. *Kymer* and Co. refused the consignment, and the goods were delivered to *Dewhurst* and Co.; but no promise in writing was obtained from them. They did however in fact pay the bills, and account for the defendant's moiety, and gave him credit for all the freight; notwithstanding which he continued greatly in their debt. Lord *Kenyon* thought, upon the first trial, that the bill of lading imposed upon the captain the obligation at his peril to get the freight on delivering the cargo: but the Court thought otherwise, and granted a new trial. Upon the second trial, Lord *Kenyon* told the jury that he conceived at the first trial that the charter-party was controlled by the bills of lading, and imposed upon the plaintiff the duty of receiving the freight: but that the Court of King's Bench thought the bills of lading imposed no such duty upon him; and that whatever his (Lord *Kenyon*'s) private opinion was, he was bound to say he was at first mistaken. And the plaintiff thereupon had a verdict for 967*l.* 16*s.* This was in 1790; and ten years afterwards came the case of *Tapley* v. *Martens*, 8 *Term Rep.* 451. The plaintiff sued for freight upon a charter-party, wherein the defendant stipulated to pay the freight *on delivery of the cargo according to the bill of lading*. The bill of lading is not set out, but it was probably in the usual form. It was certainly intended that the freight should

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be paid by the consignee; he being indebted to the defendant in more than that amount. Part of the freight was paid abroad, but for *part of it*, viz. 500*l.*, the captain *took a bill*; and that bill being dishonoured, the captain sued upon the charter-party for this part of the freight. Now had it been his duty to receive payment of the freight before he parted with his cargo, he would have taken this bill at his peril, and he could never afterwards have resorted to the defendant upon the charter-party: but, upon a case reserved, the Court thought it very clear that he was warranted in delivering the cargo as he did, and that the defendant was liable to the action. Lastly, in *Christy* v. *Rowe*, 1 *Taunt.* 300., where there was a charter-party, and a bill of lading in the same form as this, the Court of Common Pleas held that the captain was not bound at his peril to insist upon his freight at the time of delivering the goods; but that if he delivered the goods, and could not afterwards get the freight from the consignee, he might sue the charterer for it upon the charter-party. These cases, therefore, prove that such a clause as this does not in general cast the duty upon the captain at his peril of his obtaining his freight from the consignee; but that if he cannot get it from him, he may insist upon having it from the charterer. Nor is there any thing particular in this case, to warrant us in saying that the contrary was intended by the parties to these stipulations. The charter-party imports that the delivery was to be to the *correspondents, factors, or agents of the defendant*: and there is nothing in the bill of lading which implies that *the consignees* were not to be understood as comprehended within this description of "*correspondents, factors, or agents* of the defendant." The *assign* or *appointee* of *John de la*

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Piedra (if there had been any person properly answering this description,) would have been derivatively the agent of the defendant himself. Under the circumstances of this case the observation that the defendant's covenant in the charter-party is to pay *immediately* upon delivery, and that the bills of lading look to a payment abroad, by fixing the rate of exchange, do not appear to us to vary the case. The charter-party gives him a right to demand payment upon delivery, if he think fit; and the bills of lading only fix the rate of exchange, if he demand it; but they do not imply that he must necessarily make the demand abroad, or that he may not wait for payment till his return. The other objections, that the plaintiff had no right to go to *Cadiz*, or to deliver to the defendant's agent there, are easily answered. The charter-party stipulated for delivery at *Tangiers*, *St. Lucar*, or *Cadiz*; and the omission of *Cadiz* in the bills of lading was in effect for the benefit of the captain, to relieve him from the necessity of going thither if he should wish to decline it; but it did not take from him the power of going there, if he should be willing so to do, and the defendant's correspondents should desire it. If they chose to accept at *Cadiz*, instead of either of the other places, why were they not at liberty to do so? Then as to the delivery to the defendant's agent at *Cadiz*, who is considered as a stranger to the bill of lading; he may be looked upon either as virtually the appointee of *John de la Piedra*; and in that way he takes under the bill of lading as *his assign*; or if not, *John de la Piedra* must be considered as refusing to accept, or to make an appointment under the bill of lading; and then, in default of his having appointed any assign, the plaintiff could not do otherwise than deliver to the agent of the defendant

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himself, the original proprietor. For these reasons we think the defence is not made out, and that the plaintiff is entitled to judgment.

Monday, May 27th.

Lady GARDNER and Others, Executrix and Executors of Lord GARDNER, *against* LYNE.

The commander of the *Cork* naval station, on 3d of *May*, ordered the *Loire* frigate, under his command, to cruize for a month within certain limits mentioned; (whether within the *Cork* station or not did not appear;) but in case of obtaining intelligence of the enemy being at sea, to return immediately and report the same to him, unless the captain should deem it more serviceable first to apprize the commander in chief of the *Channel* fleet off *Brest* of it, and then to return to *Cork* without loss of time. The *Loire* having sailed and obtained such intelligence on her cruize, went off *Brest* and communicated it to the commander of the *Channel* fleet on the 25th of *May*, who, on the 28th, ordered the *Loire* to go off *Ferrol* with dispatches, &c. and afterwards, *and whilst in the execution of her former orders from the commander of the* Cork *station*, to look out for the *Jamaica* homeward-bound convoy within certain limitts (which were partly within and partly beyond her original cruizing orders,) and, if met with, to protect them up *St. George's* and the *Bristol Channel*. The *Loire* having delivered the dispatches, &c. to the naval commander off *Ferrol*, on her return took three prizes, beyond, (as was admitted,) the limits of the *Channel* station, and asserted to be within the *Cork* station; (but whether or not within the *Cork* station, was deemed to be immaterial in this case.) Held that the commander in chief of the *Channel* fleet did not, in the true meaning of his orders to the *Loire*, intend to retain her under his command after the execution of his order off *Ferrol*, but only that she should attend to his further instructions *whilst executing her original orders*, and as a modification of or addition to such orders, rather than as a supercession or abrogation of them. But that if he had so intended, he had no right so to retain her out of the limits of his command, by partial modifications of her original orders, for the purpose of entitling himself to prize taken by her out of such limits, in derogation of the rights of another flag officer.

Quære how the case would be where a cruizer in chace pursues an enemy out of the limits of one station into another.

IN assumpsit for money had and received by the defendant to the use of the testator, which was brought to try his right to certain prize-money, before Lord *Ellenborough* C. J. at the sittings in *London* after *Trinity* term 1810, a verdict was taken for the plaintiff for 375*l.* subject to the opinion of the Court on the following case.

An order having been issued by the Lords Commissioners of the Admiralty to Admiral Lord *Gardner*, dated *March* 20th, 1805, requiring him to take the command of the *Channel* fleet, and to deliver up to Rear-admiral *Drury* the command of the squadron stationed at *Cork*;

Lord

Lord *Gardner* took the command of the *Channel* fleet, and held it during *May* and *June* 1805; having previously transferred to Rear-admiral *Drury* the command of the *Cork* station by letter dated 5th of *March* 1805, in which he styles himself commander-in-chief of his majesty's ships employed *at* Cork *and upon the coast of* Ireland, and states that the Admiralty had directed him to proceed to *Plymouth* and *leave the port duty to* Admiral *Drury*: he therefore directs Rear-admiral *Drury* to proceed immediately to *Cork*, and on his arrival to take under his command the ships named in the margin, (amongst others the *Loire* frigate, Captain *Maitland*,) "*employing them as you shall judge best for his majesty's service.*" Rear-admiral *Drury* also received an order from the Admiralty dated *February* 27th, 1805, requiring him to receive this command; and he accordingly held it during the said months of *May* and *June* 1805. On the 3d of *May* Rear-admiral *Drury* issued the following order to Captain *Maitland* of the *Loire*, dated *Cork* Harbour: "Notwithstanding former orders, you are hereby directed to proceed in his majesty's ship under your command, with the *Newfoundland* trade in your charge, to *Falmouth*, to join convoy appointed for the 10th of this month; and having seen in safety there you will proceed and cruize between the latitude of 48 N. and 53 N., and from the longitude of 10 to 25 W., for the protection of the trade of his majesty's subjects, and the annoyance of the enemy, for one month from the day of your arrival on your station, after escorting your convoy as aforesaid. But in the event of falling in with the enemy's fleet from *Brest* or any other of their ports, or of obtain-

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" ing any certain intelligence of their being at ſea, you " are to return immediately to this harbour to report the " ſame to me, unleſs upon due conſideration of cir- " cumſtances you ſhall think it beſt for his majeſty's " ſervice to apprize the admiral cruiſing off *Breſt* thereof; " in which caſe you will endeavour to fall in with him; " and having communicated to him ſuch intelligence, " *you are to return here without loſs of time.* If you ſhould " not meet with the enemy's fleet, nor obtain any ma- " terial intelligence deemed to be neceſſary for my im- " mediate information, you are to return to this port at " the expiration of a month from the day of arriving on " your ſtation, after leaving your convoy at *Falmouth* as " aforeſaid." On the ſame day Rear-admiral *Drury* iſ- ſued this other order to Captain *Maitland*: " Whereas " the maſters of the *Newfoundland* veſſels, which you " have been ordered to eſcort to *Falmouth*, have all re- " turned their convoy inſtructions, refuſing to proceed " thither; you are hereby directed to put to ſea with his " majeſty's ſhip under your command, and cruize a " month in proſecution of the orders which you have " already received of this date." In purſuance and ex- ecution of theſe orders Captain *Maitland* ſailed; and, having gained intelligence of an enemy's ſquadron, gave information thereof to Admiral Lord *Gardner* on the 25th of *May* 1805; and on the 28th Lord *Gardner* iſſued this order to Captain *Maitland*, dated on board the *Hibernia*, off *Uſhant*: " You are hereby directed " to receive on board his majeſty's ſhip under your com- " mand, from the *Polyphemus*, Captain *William Brown* " and ſuch other officers and men as are come out in the " ſaid ſhip to join his majeſty's ſhip *Ajax*; and taking

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" charge of the accompanying dispatches addressed to
" Vice-admiral Sir *Robert Calder*, make the best of your
" way off *Ferroll*, and deliver the said pacquets to the
" Vice-admiral; putting Captain *Brown* on board the
" *Ajax*. The Lords Commissioners of the Admiralty
" having acquainted me that his majesty's ship *Desirée*
" and a sloop were to sail with a homeward-bound con-
" voy from *Jamaica* on the 20th last month, I enclose
" you herewith a copy of the private signals established
" by R. A. *Dacres*, to be used by the vessels of the said
" convoy. And you are hereby directed, *while in the*
" *execution of the order you have already received from*
" *R. A.* Drury, to keep a good look out for the said convoy
" in latitude 49 deg. and 20 min. north, and from 10 to
" 30 leagues westward of *Scilly*; and should you fall in
" with it, you are to afford it every protection and as-
" sistance in your power; seeing such ships as are bound
" up *St. George's* and the *Bristol Channels* in safety.
" But in the event of your not falling in with the afore-
" said convoy by the 20th of next month, you are to
" return to *Cork* and follow the orders of R. A. *Drury*."
Upon receiving this order Captain *Maitland* sailed off *Ferrol*, and having there delivered the dispatches to Sir *R. Calder*, was proceeding on his return, when in *Muros Bay*, on the 1st of *June* 1805, he captured one *French* and two *Spanish* vessels, which have since been condemned as lawful prizes to the king; the flag-eights of which amount to 375*l.*, and that sum has been received by and is now in the hands of the defendant as agent for R. A. *Drury*.

The case then set out the king's proclamation of the 7th of *July* 1803 and the 31st of *January* 1805 for granting

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granting the diſtribution of prizes during the preſent hoſtilities; the only material parts of which, as affecting the preſent queſtion, or referred to by way of illuſtration, were theſe: "The captain or captains of any of the "ſaid ſhips or veſſels of war who ſhall be actually on "board at the taking of any prize ſhall have 3-8th parts: "but in caſe any ſuch prize ſhall be taken by any of our "ſhips or veſſels of war under the command of a flag "or flags, the flag-officer or officers, being actually on "board, or directing and aſſiſting in the capture, ſhall "have one of the ſaid 3-8th parts; the ſaid 1-8th to be "paid to ſuch flag or flags, officer or officers, in ſuch "proportions and ſubject to ſuch regulations as are "hereinafter-mentioned." "We do hereby further will "and direct that the following regulations ſhall be ob-"ſerved concerning the 1-8th part hereinbefore-men-"tioned to be granted to the flag-officers who ſhall "actually be on board at the taking of any prize, or "ſhall be directing or aſſiſting therein. Firſt, A captain "of a ſhip ſhall be deemed to be under the command of "a flag when he ſhall actually have received ſome order "directly from, or be acting in execution of ſome order "iſſued by a flag-officer; and ſhall be deemed to con-"tinue under the command of ſuch flag ſo long as the "flag-officer by whom the order was iſſued, or any other "flag-officer acting upon the ſame ſtation, ſhall continue "upon ſuch ſtation, or until ſuch captain ſhall have re-"ceived ſome order directly from, or be acting in ex-"ecution of ſome order iſſued by ſome other flag-officer, "or the Lords Commiſſioners of the Admiralty. 2dly, "That a flag-officer, commander-in-chief, where there "is but one flag-officer upon ſervice, ſhall have to his

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" own uſe the ſaid 1-8th of the prizes taken by the ſhips " and veſſels under his command. 3dly, That a flag-officer " ſent to command on any ſtation ſhall have no right " to any ſhare of prizes taken by ſhips or veſſels em- " ployed there before he arrives within the limits of ſuch " ſtation, and actually takes upon him the command by " communicating orders to the flag-officer previouſly in " command; ſave only that he ſhall be entitled to a " ſhare of prizes taken by thoſe particular ſhips to which " he ſhall actually have given ſome order and taken un- " der his command within the limits of ſuch ſtation. " 4thly, That a commander-in-chief or other flag-officer " appointed or belonging to any ſtation, and paſſing " through or into any other ſtation, ſhall not be entitled " to ſhare in any prize taken out of the limits of the " ſtation to which he is appointed or belongs by any ſhip " or veſſel under the command of a flag-officer of any " other ſtation, or under admiralty orders; unleſs ſuch " commander-in-chief or flag-officer is expreſsly author- " ized by the Lords Commiſſioners of the Admiralty to " take upon him the command in that ſtation in which " the prize is taken, and ſhall have actually taken upon " him ſuch command in manner aforeſaid. 5thly, That " when an inferior flag-officer is ſent to reinforce a ſupe- " rior flag-officer on any ſtation, the ſuperior flag-officer " ſhall have no right to any ſhare of prizes taken by " the inferior flag-officer before the inferior flag-officer " ſhall arrive within the limits of the ſtation, and more- " over ſhall actually receive ſome order directly from " him, or be acting in execution of ſome order iſſued " by him. 6thly, That a chief flag-officer quitting a " ſtation either to return home, or to aſſume another " command, or otherwiſe, except upon ſome particular

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"urgent service, with the intention of returning to the "station as soon as such service is performed, shall have "no share of prizes taken by the ships or vessels left be- "hind, after he shall have passed the limits of the sta- "tion, or after he shall have surrendered the command "to another flag-officer appointed by the Admiralty to "be commander-in-chief upon such station. 7thly, "That an inferior flag-officer quitting a station, except "when detached by orders from his commander-in-chief "out of the limits thereof upon a special service, with "orders to return to such station as soon as such service "is performed, shall have no share in prizes taken by the "ships and vessels remaining on the station after he shall "have passed the limits thereof. And in like manner "the flag-officer remaining on the station shall have no "share of the prizes taken by such inferior flag-officer, "or by the ships and vessels under his immediate com- "mand, after he shall have quitted the limits of the "station, except when detached as aforesaid."

The question was, whether under these circumstances, Admiral Lord *Gardner* (who then commanded the *Channel* fleet,) was entitled to the flag-eighth of the said prizes? If he were, the verdict was to stand: if not, a verdict was to be entered for the defendant.

The case was argued on an early day in this term by *Brougham* for the plaintiffs, and *Gifford* for the defendant: but as the arguments turned principally on the special circumstances of the case, and are explicitly stated in the judgment, they need not be repeated. And on this day,

Lord ELLENBOROUGH C. J. delivered the judgment of the Court.

This

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This was an action by the executors of the late Lord *Gardner* for prize-money; and the queſtion was, whether the teſtator was entitled to the flag-eighth of three prizes taken by the *Loire* frigate, Captain *Maitland*. In *March* 1805 the *Loire* was one of the ſhips upon the *Cork* ſtation, and was put at that time, with the reſt of the fleet, upon that ſtation, under the command of Rear-admiral *Drury*. In *May* 1805, Rear-admiral *Drury* gave orders to the *Loire* to proceed to certain limits ſpecified in his orders, and to cruize within thoſe limits for a month from the time of his arriving within them: but in the event of the *Loire*'s falling in with the enemy's fleet from *Breſt*, or any other of their ports, or obtaining any certain intelligence of their being at ſea, ſhe was to return immediately, and report the ſame to Rear-admiral *Drury*; unleſs upon due conſideration of circumſtances, Captain *Maitland* ſhould think it beſt for his majeſty's ſervice to apprize the admiral cruizing off *Breſt* therewith; in which caſe Captain *Maitland* was to endeavour to fall in with him, and having communicated to him ſuch intelligence, the *Loire* was to return to *Cork* without loſs of time. Whether the limits, within which the *Loire* was by theſe orders directed to cruize, were within the *Cork* ſtation or not, is not ſtated. In obedience to theſe orders the *Loire* ſailed, and having received intelligence of an enemy's ſquadron, Captain *Maitland* gave information thereof to the late Lord *Gardner*, who had then the command of the *Channel* fleet. This information was given on or about the 25th of *May*; and on the 28th of *May* Lord *Gardner* iſſued an order to Captain *Maitland*, upon which the plaintiffs found their claim. That order directs him *to make the beſt of his way off* Ferrol with certain diſpatches and men; to deliver the diſpatches to

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Vice-admiral Sir *Robert Calder*, and to put the men on board the *Ajax*. It then communicates to him the private ſignals of the homeward-bound convoy from *Jamaica*, and requires him, "*whilſt in the execution of the* "*order he* (*Captain M.*) *had received from Rear-admiral* "Drury," to keep a good look-out for the ſaid convoy in certain ſpecified limits, and, upon falling in with it, to afford it every protection; ſeeing ſuch ſhips in ſafety as were bound up *St. George's* and the *Briſtol Channel*. The limits within which this look-out was to be kept were partly within thoſe in which Rear-admiral *Drury* directed the *Loire* to cruize, and partly beyond them. Captain *Maitland* ſailed off *Ferrol*, delivered the diſpatches to Vice-admiral Sir *Robert Calder*, and put the men on board the *Ajax*, and was proceeding on his return, when he captured the three prizes in queſtion. It is not ſtated in the caſe, that the place where theſe prizes were taken is within the limits of the *Channel* ſtation, and it was admitted upon the argument that it is not. It was aſſerted, indeed, that it is within the limits of the *Cork* ſtation; but that point, whichever way it may be, ſeems immaterial to the plaintiffs' right.

Upon theſe facts two queſtions ariſe; the one, whether Lord *Gardner* muſt be underſtood to have *intended*, by the orders he gave, to keep this ſhip under his command after ſhe ſhould have have executed his directions in reſpect to *Ferrol*, and whilſt ſhe ſhould be ſailing within the limits ſpecified in his order: and 2dly, whether (if this were his intention) he could ſo keep the ſhip under his command, as to entitle himſelf to a ſhare of the prizes ſhe might during that time take? and upon each of theſe queſtions our opinion is againſt the plaintiffs.

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tiffs. The main ground upon which it was contended upon the argument, that the *Loire* was acting under the command of Lord *Gardner* at the time of the captures, was this; that he had directed a look-out for the *Jamaica* convoy beyond the limits in which Rear-admiral *Drury* had ordered the vessel to cruize: and we were desired to look at the respective orders of the two admirals to ascertain under *which* of them she would be under in looking out for that convoy. Rear-admiral *Drury* directs her to cruize between 48 and 53 north latitude, and from 10 to 25 west longitude; and Lord *Gardner* orders her to keep a look-out in latitude 49 deg. 20 min. north, and from 10 to 30 leagues west of *Scilly*; which would be from 7 to 10 degrees west longitude. Lord *Gardner*, however, directs her to keep this look-out "*whilst Captain* Maitland *is in the execution of the order he had already received from Rear-admiral* Drury." It is therefore to be considered rather as a modification of, or addition to, Rear-admiral *Drury*'s orders, for the purpose of a more beneficial execution, than as a supercession or abrogation of them; as enjoining a coincident and not a contradictory service. He does not profess to give the ship a new direction as from himself, so as to supersede or vacate Rear-admiral *Drury*'s orders; but says what shall be done *whilst* the execution of those orders is going on. Lord *Gardner* either misapprehended the extent within which those orders had directed Captain *Maitland* to cruize; or he thought it would be within the spirit of them, though not strictly within their letter, to extend them to the limits which his own order assigns. He does not profess to do so invidious a thing, a thing so calculated to produce jealousy and ill humour in the service, as to take the cruizer of another admiral from the com-

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command of that admiral, and, by a trifling alteration in the limits and period for her cruizing, to aim at excluding that admiral from all intereſt in her prizes, and entitling himſelf thereto: but he gives her certain additional directions, upon the preſumption that they would be compatible in ſubſtance with the orders which had been given by the original admiral; and that, whilſt in the execution of the orders given by Rear-admiral *Drury*, the ſhip would be able to attend to the additional inſtructions ſuggeſted by himſelf in furtherance of the antecedent orders. We are therefore of opinion upon the firſt queſtion, that Lord *Gardner* is not to be underſtood as having intended to continue this ſhip under his command after ſhe ſhould have executed his orders off *Ferrol*: and if not, it is not perhaps abſolutely neceſſary for us to give an opinion upon the ſecond queſtion.

It may, however, be adviſable for the intereſts of the ſervice, in order to prevent its being ſuppoſed that we have doubts where we really entertain none, to expreſs our opinion upon the ſecond point alſo: and that opinion is this; that if Lord *Gardner* had intended to annul the orders of Rear-admiral *Drury*, and to put this ſhip under new ſailing orders of his own, he would not have been entitled to ſhare in any prizes ſhe might take after ſhe had executed his orders at *Ferrol*, and had left the limits of his ſtation. It may, perhaps, be doubted, whether the commander upon one ſtation can in any caſe annex to his command a cruizer put by the Admiralty under the command of an admiral upon another ſtation: but if that could be done, we are of opinion he cannot entitle himſelf to ſhare in the prizes ſhe may take whilſt cruizing under the orders he may have given her, unleſs taken during ſuch time as ſhe cruizes within the limits of his ſtation.

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ſtation. What may be the caſe, where a ſhip is in chace, and purſues the enemy from and beyond the limits of the one ſtation in which the chace begun into thoſe of another, is a different queſtion: but this, upon the ſuppoſition we are now conſidering, is to be taken as the caſe of a ſhip ſent by Lord *Gardner to cruize out of the limits of his ſtation*. The idea of *a ſtation* implies that the limits of that ſtation are to be under the ſuperintendance and control of the commander of that ſtation, and that he may place his cruizers, *within the limits of that ſtation*, wherever, in his judgment, the intereſt of the ſervice may require: but to allow him to place his cruizers *beyond his own ſtation*, for the purpoſe of cruizing *out of that ſtation*, is inconſiſtent with the idea of *a ſtation*, and is making the whole ocean from one extremity to the other eventually within the limits of any one particular ſtation. To warrant a claim in this extent, there ought to be ſome deciſion upon the point, or ſomething plain and unequivocal in the terms of the prize proclamation. The only caſes cited in argument were the *Orion*, 4 *Rob.* 362, alſo ſtated in 6 *Eaſt*, 232, and *Holmes* v. *Rainier*, 8 *Eaſt*, 502; and the parts relied upon in the proclamation were the 3d and 5th articles of that part of it which relates to the flag-eighth; and none of theſe appear, upon examination, to advance the plaintiff's claim. The caſe of the *Orion* decides no more than this; that if a ſhip under the command of a flag be detached by a ſuperior authority *from the ſervice of that flag upon ſome diſtinct and ſeparate duty*, ſuch ſuperior authority giving her orders not confirmatory of or coincident with the orders ſhe had received from her original flag, but ſuſpending and annulling theſe orders for a time, and producing events and captures which, under ſuch original orders, would never have occurred,

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the original flag, whose orders are so suspended, is not entitled to any share in the captures made under the new orders; because such original flag cannot be considered as *directing or assisting* in *such captures*. This case, therefore, decides only that the original flag has no title; but it leaves the question untouched, under what circumstances, and to what extent, the other flag is entitled, where the superior authority giving the new and suspending orders is a flag-officer. The case of *Holmes* v. *Rainier*, instead of being in the plaintiff's favour, seems to be against him. There Admiral *Pringle*, who had the *Cape of Good Hope* station, sent one of his ships into the station of Admiral *Rainier* for repairs. Admiral *Rainier* ordered him, upon his return to his commanding officer, to convoy certain ships; and, whilst he was upon his return, and before he had got beyond the limits of Admiral *Rainier*'s station, and reached that of the *Cape*, he made the captures which gave rise to the action. The action was brought, not by Admiral *Rainier*, who stood in the situation in which Lord *Gardner* stands here, but by the executors of Sir *Hugh Christian*, who succeeded Admiral *Pringle* upon the *Cape* station: and all that the Court decided was, not that Admiral *Rainier* was entitled, but that Sir *Hugh Christian* was not. Some expressions, however, I observe to have fallen from myself and others of the Judges, intimating an opinion, that where the limits of a station were ascertained, and the commander on that station had no special power expressly given him beyond that station, he could only share in such prizes as were taken within such station. These decisions, therefore, do not advance the plaintiff's claim. And as to the proclamation, the 3d article in that part

 which

which regulates the flag-officer's eighth, feems to contemplate captures within the flag-officer's ftation, and within that ftation only: and the caufe of its introduction, as collected by a reference to the earlier proclamations on the fubject, excludes all doubt as to its meaning. The only object of the 5th article was to prevent its being fuppofed that the inferior flag was part of the fuperior's force, and conftructively under his command, *whilft on the way to join him*, and before the receipt of any order from him. Upon the whole it appears to us that there is nothing in the proclamation from which any argument can fairly be drawn in the plaintiff's favour; that there is no decifion to fupport the claim; and as it might be of dangerous confequence to the fervice to allow a flag-officer upon one ftation to appropriate to himfelf a cruizer under the command of a flag-officer of another ftation, and to employ it upon a cruize in a place which does not appear to be within the limits of his own ftation; we are of opinion, that the plaintiffs are on this ground alfo not entitled to recover, and that the verdict fhould be entered for the defendant.

1811.

Lady GARDNER *against* LYNE.

Poftea to the Defendant.

1811.

Monday, May 27th.

Cock *against* Brockhurst and Another, Bail of Bell.

For the purpose of fixing the bail on scire facias, the capias ad satisfaciendum against the principal must lie the *four last* days in the office before the return. And the bail having once been prepared to render their principal in time, which they then omitted to do, in consequence of a rule nisi taken out by them on the suggestion of the Court, with a view to an arrangement out of court between the parties, (the principal being a lunatic,) which rule was afterwards discharged, without providing for the bail to be placed in the same situation that they were in before; the Court, in a subsequent term, permitted the bail to take the above objection to the regularity of the proceedings, though they had before, in the same term, before they were aware of this objection, brought forward another objection, which was over-ruled.

BELL, the principal, became a lunatic in *October* 1809, and a commission of lunacy was issued against him; after which the plaintiff brought his action, and recovered against him 5000*l.* and upwards, at the sittings after last *Trinity* term. Proceedings were thereupon had against the bail; and after the first writ of scire facias sued out against them, when they were in time to render their principal, they took out a writ of habeas corpus, and had him ready in the vicinity of the court to have rendered him; when the Court, considering the condition of the principal, and with a view to an arrangement between the parties, gave a rule nisi to enter an exoneretur on the bail-piece, or for further time to render the principal: but no arrangement having been made, and the rule being resisted in last *Hilary* term (a), the Court held themselves bound to discharge it on both points. In the mean time, however, the plaintiff proceeded with his writs of scire facias against the bail; and though it now seemed probable that the alias writ of scire facias was sued out before, yet that was not known to the bail at the time, and it was not brought into the office, as it was stated, till the day after the rule nisi had been obtained. In consequence of this, a second application was made on behalf of the bail in this term, to set aside the alias writ of scire facias, as having been improperly issued

(a) Vide Cock v. *Bell*, ante, 355.

13 pending

1811. COCK *against* BROCKHURST.

pending the former rule: but the rule for that purpose was discharged a few days ago; the Court, on consideration of the terms of the first rule, not thinking that the plaintiff was thereby restrained from proceeding against the bail. After which the plaintiff continuing to proceed against the bail;

Curwood, on *Friday* last, the 24th of *May*, made the present application, on their part, to set aside the proceedings against them for irregularity, on the ground of the capias ad satisfaciendum against the principal, which was tested on the 6th of *November*, returnable in eight days of *St. Martin*, (*i. e.* on the 22d of *November*,) and which, by the practice of the court, should have lain in the office for the last four days, was taken out on the 20th; and therefore that the writs of scire facias, founded on the return of non est inventus to the capias, were irregularly issued. For which he cited *Forty* v. *Hermer* (*a*), where a scire facias against bail was set aside upon the same objection. *The Court* then inquired why this objection had not been taken before, which existed, if at all, at the time when the former application had been made to set aside the scire facias against the bail for irregularity, which had been recently discharged. It was answered, that this objection was not known to the bail at the time, and did not appear upon the former affidavits. *The Court* thereupon, considering the largeness of the sum, and what had passed before in court, partly upon their own suggestion, granted a rule to shew cause; but intimated that he should be prepared to answer this objection, which no doubt would be taken upon shewing cause.

(*a*) 4 *Term Rep.* 583.

1811.
Cock against Brockhurst.

Taddy now opposed the rule, on behalf of the plaintiff, and first denied that the same rule of practice, which required the *scire facias* to lie the last four days in the office before the return, applied also to the capias ad satisfaciendum against the principal: and here the capias had lain more than four, though not the *last four* days in the office. And the same reason, he observed, did not apply; because the writs of scire facias were never served on the bail, and they could only know of the proceeding against them by searching the office; but the capias might be served on the principal if he could be found, which would exonerate the bail. [The Court observed that in order to found the proceedings against the bail, there must be a return of non est inventus to the capias; and therefore there was the same reason for its lying the last four days in the office, in order to give the bail an opportunity of searching, that they might have notice whether they were to be fixed at the return of the writ.] In fact the capias is never attempted to be served, and therefore its lying in the office is mere form. [*Bayley* J. Suppose the principal died before the return of the capias?] He then objected that this application came too late after two former ineffectual applications on the part of the bail for relief, the last of which was made on the ground of a subsequent irregularity to that which was now relied on. The rule has been laid down in cases (*a*) upon the annuity act, that the Court would not entertain a second application, upon an objection to an annuity, which might have been made upon the first: and this rule must hold still more strongly in matters of practice, where the Court always require that the party objecting to a mere irregularity

(*a*) *Greathead* v. *Bromley*, 7 *Term Rep.* 455.; and *Schumann* v. *Weatherhead*, 1 *East*, 537.

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COCK *against* BROCKHURST.

larity should apply in the first instance before any further proceeding is taken; considering every subsequent step taken as a waver of any objection to the preceding step.

Topping and *Curwood*, in support of the rule, said that it appeared by the affidavits of the bail, that they were not indemnified in this case; and as they were prepared in time to have rendered the lunatic, when the first rule was taken out at the recommendation of the Court, they were entitled to every indulgence consistently with the strict rules of practice, and within the discretionary power of the Court. That the plaintiff was now put in the same situation as he would have been in if the bail had rendered their principal when they were first prepared to have done so; for on the 18th of *February* he was rendered on another habeas corpus issued. [Lord *Ellenborough* C. J. said that if the Court were clearly satisfied that the bail had been misled by the terms of a rule issued at the suggestion of the Court, they would not suffer them to be prejudiced by it.] They said that the irregularity now complained of was clear; for besides the case of *Forty* v. *Hermer* (*a*) before referred to, there is a case in *Salkeld* (*b*) which says that the capias ad satisfaciendum against the principal, in order to charge the bail, must lie four days exclusive in the sheriff's office; and this has always been deemed to mean the four last days. Then as to the bail lying by and taking another objection to the irregularity of the proceedings, they were driven, in order to save themselves for the time, to bring forward

(*a*) 4 *Term Rep.* 583.; and vide *Reg. Gen. E.* 5 *Geo.* 2. *R.* & *O. of K. B.* 11

(*b*) *Anon.* p. 599.

1811.

Cock *against* Brockhurst.

the firſt objection which offered, and before they were apprized of this objection, not thinking that the plaintiff would have proceeded pending the firſt rule.

Lord ELLENBOROUGH C. J. It is very convenient to abide by the rule of the Court, that parties, who mean to take advantage of any defect of form, ſhall bring forward all their objections at once, and not by piece-meal. But if the bail in this caſe have neglected to do that which they were once in a condition to have done, and were prepared to do, in conſequence of their having fairly underſtood at the time that the Court had ſufficiently provided for their ſecurity by putting them in the ſame ſituation, after the firſt rule was diſpoſed of, which they were in at the time when that rule was granted, the Court would do injuſtice not to protect them. Their preſent embarraſſment has grown out of the act of the Court, rather than from their own neglect. Then, as to the point of practice, we think that in order to fix the bail, the writ of capias ad ſatisfaciendum ought to have lain the laſt four days in the office.

The other Judges agreed; and the Court thereupon, the principal having been rendered, ſtayed the proceedings againſt the bail; but, as this was done in relief of the bail under the ſpecial circumſtances of the caſe, they directed the rule to be made abſolute on payment of coſts by the bail.

END OF EASTER TERM.

AN
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PRINCIPAL MATTERS.

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which was placed under the superior command of a captain appointed by the Board, is forfeitable for an act of smuggling committed on board by such Admiralty captain, as well as by the owner's master and crew: and the owner has his remedy over by action on the case against such Admiralty captain to recover damages for the loss of his ship by the condemnation, though that proceeded upon acts of smuggling stated to be by persons unknown; and though it appeared in fact that the master and mate appointed by the owner were also concerned in acts of smuggling on board. *Blewitt* v. *Hill*, *M* 51 *G.* 3. 13

A count in an action on the case stated that whereas heretofore, &c. the plaintiffs agreed to purchase, and the defendants to sell and deliver to them, *at a certain rate or price per pound, to be paid in a manner then stipulated between them*, 40 bags of wool, *to be delivered* by the defendants to the plaintiffs, *at a time which, before the making of the promise of the defendants after mentioned, had elapsed*, but which wool had not then been delivered; and thereupon, *in consideration of the premises, and also in consideration* that the plaintiffs would still receive and pay for the said wool, *at the rate or price, and in manner last aforesaid*, on the delivery of it within a reasonable time, *the defendants promised* the plaintiffs to deliver the said wool accordingly within such reasonable time as aforesaid: and then alleged that though the plaintiffs, for a reasonable time after the defendants' promise, were ready and willing to receive and pay for the wool, *at the rate or price and in manner last aforesaid*, yet the defendants would not deliver, &c; held that this was too general, and bad upon special demurrer; inasmuch as *no price and manner of payment* were mentioned; which were referred to in, and incorporated with, and made part of the consideration of, the new promise declared on; and without such price being stated, no measure was given to the jury for estimating the damage to the plaintiffs by the non-delivery of the goods *Andrews and Others* v. *Whitehead and Another*, *M.* 51 *G.* 3. 102

ADJOURNMENT,

See Appeal, 2.

ADMINISTRATION.

An examined copy of the act-book in the registry of the Prerogative Court of *Canterbury*, stating that administration was granted to the defendant of her husband's goods at such a time, is proof of her being such administratrix, in an action against her as such, without giving her notice to produce the letters of administration. *Davis* v. *Williams, Administratrix*, *H* 51 *G* 3. 232
S. P. *Ray and Another, Assignees of Larkin*, v. *Clerk*, *London* sittings after *Hil.* or *Easter* 1775, cor. Lord *Mansfield* C J. ib. 238

ADMIRALTY VESSEL,

See Smuggling, 1.

AFFIDAVITS.

Affidavits not intitled *in the King's Bench*, and sworn before *A. B., a commissioner*, &c; without stating him to be a commissioner *of this court*; cannot be read: but those *sworn in court*, or *before a Judge of the court*, though not intitled *in the King's Bench*, may be read. *The King* v. *Hare*, *T.* 50 *G.* 3. 189

AGENT AND PRINCIPAL.

See Insurance, 1. 4.

1. Where an agent had received a Bank-note remitted by his principal abroad,

abroad, which was challenged to be the property of a third person, from whom it had been obtained by fraud, and stopped by the Bank: in trover by such agent against the Bank for the recovery of the note, evidence being given to affect his principal with the fraud, the question was not altered by such agent, who received it on account, having, *after notice*, made payments for his principal, which turned the balance in favour of such agent. *Solomons* v. *The Bank of England*, *M.* 32 *G.* 3. *B. R.* 135

2. A share in the *London* Institution, incorporated by charter for the advancement of literature, &c. cannot be transferred until the proprietor shall, *by writing under his hand*, signify his desire so to do, to the committee of managers, and mention therein *the name*, &c. and other description of the person to whom he is desirous the same should be transferred, which person is to be approved by the committee: held, that a note addressed to them in these words; "Having disposed of my share in the *London* Institution to [leaving a *blank* for the *name*], I beg leave to recommend him to be elected in my place, as a proprietor," &c and signed by the proprietor; which note was left in the hands of an agent, (the clerk of the society,) for the purpose of selling the share; did not authorize such agent to fill up the blank himself with the name of the purchaser with whom he contracted for the price, against the rules of the society, which require the recommendation of the candidate to be vouched by the proprietor himself, inserting his name, &c in the paper; and consequently the agent had no authority, before the transfer was so completed, to receive the money of the purchaser, and to insert his name in the blank, unknown to the proprietor. And such purchaser paying the money before the time of payment when the transfer from the proprietor was complete, pays it at his own risk to the agent, whom he thereby makes his own for that purpose. And such agent afterwards absconding with the money, and the society disallowing the transfer upon the interference of the proprietor; held, that the purchaser could not recover the amount from such proprietor in an action for money had and received. *Parnther* v. *Gaitskell*, *E.* 51 *G.* 3. 432

3. The holder in *America* of two bills of the same tenor, having transmitted them to his agents here, to present them for acceptance, and receive the money when due, and pay over a part to the plaintiff; while the bills so remained in his agents' hands, agreed with the defendant, the indorser, (who had lent his indorsement on each to the drawer, from whom the holder received them,) that upon payment of one of the bills he should be exonerated from both. In the mean time the bills having been presented for acceptance by the agents and dishonored; *after the dishonor*, the agents, not knowing of such agreement between their principal and the indorser, assigned one of the dishonored bills to the plaintiff, who was informed of the dishonor, and who received it liable to all its infirmities, but without notice of such agreement held, that the bill so received by the plaintiff was bound by the agreement; and that the defendant, having afterwards, but before this action, taken up and discharged the other bill which had remained in the hands of the same agents, was discharged from both. *Crossley* v. *Ham*, *E.* 51 *G.* 3. 498

4. The plaintiffs and the defendant having each lodged their respective *India* bonds with the same bankers, who

who afterwards privily and without the defendant's authority sold his bonds, and upon his demand of them delivered up to him the *India* bonds of the plaintiff to the same total amount, and payable to the same obligee, (being always the treasurer of the company, who indorses such bonds in blank before they are circulated,) but having different numbers and for different separate sums, and therefore manifestly distinguishable from his own bonds; though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for these: held, that the defendant, having sold the plaintiffs' bonds so received, was liable to answer over to them for the amount in an action of assumpsit for money had and received to their use *Glyn, Bart. and Another*, v. *Baker*, *E.* 51 *G.* 3. 509

AGREEMENT.

See Account, 2. Action on the Case. Landlord and Tenant, 1. Partners. Variance, 2, 3 Stamp.

1. The defendant agreed in writing to take one half share of certain goods bought by the plaintiff on their joint account; half in the profit or loss; and to furnish the plaintiff with half the amount in time for the payment thereof; the goods being to be paid for by bills: held, 1st, that this was an agreement *relating to the sale of goods*, within the exemption in the stamp act, 44 *G.* 3. c. 98, sched. A, and did not require a stamp. *Venning* v. *Leckie*, *M.* 51 *G.* 3. 7

2. Secondly, that the plaintiff having paid the whole price of the goods, which were to constitute the partnership stock, to which both parties were to contribute equally; an action lay against the defendant for his moiety of the price which was to be furnished by him in the first instance; although there might be an account to be taken between them, as partners, upon the subsequent disposal of the joint stock. ibid.

3. An instrument, executed on the 24th *November* 1807, upon an agreement stamp, setting forth the conditions of setting a farm, and the regulations to be observed by the tenant; that the term was to be from year to year; the lands to be entered upon the 23d of *February* 1808, and the housing on the 12th of *May; and that a lease was to be made upon these conditions with all usual covenants*; at the foot of which the defendant wrote, "*I agree to take lot* 1, (the premises in question,) *at the rent, &c. subject to the covenants*;" is *an agreement for a lease*, and not *a present demise*; there being not only a stipulation for a future lease, but time given to prepare it before the commencement of the term, and no present occupation as a tenant contracted for. But after the defendant had been let into possession under such agreement, and had paid rent under it: held, that that was sufficient to satisfy a count against him as tenant upon a demise, for mismanagement of the farm contrary to the terms of such agreement; such count stating, that whereas the plaintiff *had demised*, &c. And held, that it was not necessary to state the whole of the agreement, if the part omitted did not qualify that which was stated. *Tempest* v. *Rawling*, *M.* 51 *G.* 3. 18

4. In assumpsit upon a memorandum for a charter-party, describing the agreement of the defendant, the ship-owner, to proceed with all convenient speed to a foreign port, and there load, within 20 running days, a cargo

a cargo from the plaintiff's factors, and therewith return home, and in 15 running day's deliver the same, on payment of certain freight; concluding with a certain *penalty for non performance*: held, that the plaintiff might recover damages on the breach of the contract, in the defendant's not permitting the vessel to proceed on the voyage, beyond the amount of the penalty. *Harrison* v. *Wright*, *H.* 51 *G.* 3. 343

ALIEN AND ALIEN ENEMY,

See BAIL, 6

A native *Spaniard*, domiciled here in time of war between this country and *Spain*, having been licensed in general terms by the king to ship goods in a neutral vessel from hence to certain ports of *Spain*; such commerce is legalized for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his correspondents, though residing in the enemy's country; and such goods may, therefore, be insured by him, either on his own account, or as agent for them: and he may sue and recover upon the policy in his own name in case of a loss by capture; and this, though the prize, which was taken by a *French* privateer, (*France* being a co belligerent with *Spain* in the war, and both governments having issued similar decrees against the *British* commerce,) was afterwards condemned by a *French* consular court then sitting in a port of *Spain*, into which the prize was carried: for in respect of the purposes of such licensed trading, the subjects of *Spain* concerned in it are to be regarded as *British* subjects. *Usparicha* v. *Noble*, *H.* 51 *G.* 3. 332

APPEAL.

1. Coupling the stat. 35 *G.* 3. *c.* 101, (which enables two justices to suspend orders of removal on account of the sickness of the paupers, and to give the costs of such suspensions, with an appeal against such costs if they amount to 20*l.*) with the stat. 3 *W.* & *M.* *c.* 11. *s.* 9. (which gives an appeal to the party *grieved* by any determination of the justices' respecting the settlements of paupers by the means there mentioned;) appeals lie against an order of removal which was suspended, and against a subsequent order for costs; notwithstanding the death of the pauper before any removal of him in fact made, and though the costs were under 20*l*; such order for costs attaching by consequence a *grievance* on the parish to which the order of removal was made, if the pauper were not settled in it. *The King* v. *The Inhabitants of St. Mary-le-Bone in Middlesex*, *M.* 51 *G.* 3. 51

2. Though a statute, giving an appeal to the sessions within four months after the cause of complaint shall arise, direct the justices at the *said* sessions to hear and determine the matter of such appeal, &c.; yet it seems that they have an incidental power of adjourning it to another sessions, upon lawful cause, such as the absence of a material witness, of the sufficiency of which they are to judge. *The King* v. *The Justices of Wilts*, *H* 51 *G.* 3. 352

3. But where the appeal was against the sufficiency of an allotment under an inclosure act, and it appeared that the ground was staked out in *March*, when the appellant took possession of and cropped it, though no final award was made of it by the commissioners till long afterwards; yet an appeal lodged at the *October* sessions was held to be out of time; and this, though a small part of the allotment was, with the appellant's consent, exchanged so late as *July*. ibid.

APPREN-

APPRENTICE,

See Settlement—*by Apprenticeship.*

ARTICLES OF THE PEACE,

See Husband and Wife.

1. One against whom articles of the peace are exhibited is not entitled to read affidavits on his own behalf, in contradiction of the facts sworn to against him in such articles. *The King* v. *Doherty*, *M.* 51 *G.* 3. 171

S. P. *Rex* v. *Bringloe and Others*, *M.* 7 *G.* 2. cited ib. 174

2. Where a person exhibits articles of the peace, and swears that her life is in danger, the truth of the facts cannot be controverted. *Lord Vane's case*, *H.* 17 *G* 2. 172

3. There ought to be a reasonable foundation on the face of the articles to induce a fear of personal danger, before the Court will require sureties of the peace. ibid

ASSAULT.

In debt on bond conditioned not to assault, molest, or injure the person of the plaintiff; the replication, alleging that the defendant assaulted, molested, and injured the person of the plaintiff *by* then and there beating, &c. and otherwise ill-treating him, is sustained by evidence that the defendant, who was sitting in the same room, jumped up from his seat with his fist clenched, as if to strike the plaintiff, but was pulled back to his seat by another before he was within reach of the plaintiff. *Timbs* v. *Painter*, *M.* 51 *G.* 3. 1

ASSUMPSIT.

See Action on the Case, Charter-party, I. Penal Sum.

1. One who is subpœnaed as a witness, and attends at the trial, but there refuses to give evidence, unless his expences are paid, and is thereupon not examined, may yet maintain assumpsit for his necessary expences of attendance against the party who subpœnaed him. There was also evidence of a promise to pay the expences at the time of serving the subpœna; which it was contended was waved by the subsequent refusal to be examined. *Hallet* v. *Mears*, *M.* 51 *G.* 3. 15

2. A stakeholder receiving country bank-notes as money, and paying them over wrongfully to the original staker, after he had lost the wager, is answerable to the winner in an action for money had and received to his use. *Pickard* v. *Bankes*, *M.* 51 *G.* 3. 20

3. Where goods are sold and delivered upon an agreement by the vendee to pay for them by a bill at a certain date; as interest would have run upon such bill, if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods upon the common count for goods sold and delivered *Marshall and Another* v. *Poole and Another*, *M.* 51 *G.* 3. The same point was decided in this term in *Boyer* v *Warburton.* 98

4. The registered owner of a ship, having chartered her to the then captain at a rent for a certain number of voyages, is not liable for stores furnished to the ship by order of the charterer during the charter-party. *Frazer* v. *Marsh*, *H.* 51 *G.* 3. 238

5. An admission by a defendant that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, will support a count upon an account stated, though not for goods

goods sold and delivered. *Knowles v Michel, H.* 51 *G.* 3. 249

6. The master of a ship having contracted by the bill of lading with the shippers to deliver goods to certain persons or their assigns, *he or they paying freight for the same;* the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading, without the freight having been paid, is evidence of a new contract or promise on the part of such purchaser, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight; and he is liable for the amount in an action of indebitatus assumpsit brought against him by the ship-owner. *Cock v. Taylor, E.* 51 *G.* 3. 399

7. A share in the London Institution, incorporated by charter for the advancement of literature, &c. cannot be transferred until the proprietor shall, *by writing under his hand,* signify his desire so to do to the committee of managers, and mention therein *the name, &c.* and other description of the person to whom he is desirous the same should be transferred; which person is to be approved by the committee: held, that a note addressed to them in these words; "Having disposed of my share in "the London Institution to [*leaving* "*a blank for the name*], I beg leave "to recommend him to be elected "in my place, as a proprietor," &c., and signed by the proprietor: which note was left in the hands of an agent, (the clerk of the society,) for the purpose of selling the share; did not authorize such agent to fill up the blank himself with the name of the purchaser with whom he contracted for the price, against the rules of the society, which require the recommendation of the candidate to be vouched by the proprietor himself, inserting his name, &c. in the paper: and consequently, the agent had no authority, before the transfer was so completed, to receive the money of the purchaser and to insert his name in the blank unknown to the proprietor. And such purchaser, paying the money before the time of payment when the transfer from the proprietor was complete, pays it at his own risk to the agent, whom he thereby makes his own for that purpose. And such agent afterwards absconding with the money, and the society disallowing the transfer upon the interference of the proprietor; held that the purchaser could not recover the amount from such proprietor in an action for money had and received. *Parnther v. Gaitskell, E.* 51 *G.* 3. 432

8. No action lies by the reversioner and owner of the inheritance to recover the value of timber, cut by the deceased tenant for life after a fine levied by her, whereby she acquired a base fee, and before the avoidance of such fine and base fee by the entry of the reversioner for that purpose; such entry not revesting the reversioner's old estate *by relation during the continuance of the base fee* thus created, so as to entitle him at law to the timber and other mesne profits taken during that interval. Even supposing that after the statute of limitations had run against the appropriate action, by the reversioner against the tenant for life, for mesne profits, or for waste, upon the original wrongful act of cutting down and converting the trees, an action of assumpsit for money had and received for the purchase-money of the trees sold, which was in fact paid to the former tenant for life within six years, was maintainable against her representatives after her death. *Hughes v. Thomas and Another, Executrixes of Ann Evans, E.* 51 *G.* 3. 474

9. The

9. The plaintiffs and the defendant having each lodged their respective *India* bonds with the same bankers, who afterwards privily, and without the defendant's authority, sold his bonds; and upon his demand of them delivered up to him the *India* bonds of the plaintiffs to the same total amount, and payable to the same obligee, (being always the treasurer of the company, who indorses such bonds in blank before they are circulated,) but having different numbers, and for different separate sums, and therefore manifestly distinguishable from his own bonds; though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for these: held that the defendant, having sold the plaintiff's bonds so received from his own agents, who had acted malâ fide in passing them to him, was liable to answer over to the plaintiffs for the amount in an action of assumpsit for money had and received to their use. *Glyn, Bart.* v. *Baker*, *E.* 51 *G.* 3. 509

AWARD.

1. Where lessees of land and of coal-mines found or to be found therein covenanted *forthwith to proceed to sink for coals as far as could and ought to be accomplished by persons acquainted with the nature of collieries*, and as in such cases was usual and customary, and to erect fire-engines for the purpose by the 24th *June* 1806, *or in default thereof to pay so much to the lessor as arbitrators should award*; and after the day passed, without any new pit sunk, &c. the parties named arbitrators to award concerning the damage, loss, and delay to the lessor, if any, and whether any rent or other satisfaction should be made to him on that account; and the lessees gave bond to the lessor conditioned to perform the award: and afterwards the arbitrators awarded *that the lessees had not performed their covenant*, by not having proceeded to sink for the said coal *as far as could and ought to be accomplished*, &c. (in the words of the covenant,) on or before the 24th *June* 1806; for which they awarded to the lessor 150*l.* on account of all damages and losses then incurred on account of such breach; and further, *that the lessees should sink coal-mines and erect fire-engines for getting the coals demised on or before the 24th* June 1807; and in default thereof, *and until the same should be done, they should pay a yearly rent of* 200l. *to the lessor*, as a compensation for the lord's share reserved under the lease: held that to an action on the bond, it was a sufficient answer by the lessees to save the condition, that they had paid the 150*l.* awarded for the breach of the covenant up to the 24th *June* 1806: and as to the subsequent period from thence till the 24th *June* 1807, that on divers days between, &c. *they did well and truly sink for coal in the lands demised as far as could and ought to be accomplished*, &c. (in the words of the covenant,) and were ready and willing to have sunk and completed the pits, and to have erected the necessary fire-engines, &c. within the time limited by the award; *but that at the time of making the lease, and from thenceforth, there were no mines of coal under the lands as could or ought to be worked by any person acquainted with the nature of collieries, or, as in such cases it was usual or customary to work, or, as would have defrayed the necessary expences of working and getting the same: all which premises the defendants ascertained and proved by due and sufficient experiments and trials then and there made.* But leave was given to amend by taking issue on the sufficiency of the experiments. *Hanson*

Hanſon v. *Boothman and Others*, *M.* 51 *G.* 3. 22

2 Where a cauſe involving a queſtion of law was referred to a barriſter under a rule of court to ſettle all matters in difference between the parties; and he made his award thereupon; but the queſtion of law did not appear upon the face of the award; the Court, conſidering that it was the intention of the parties to refer the deciſion of the merits, as well upon the matter of law as of fact, to the arbitrator, refuſed to open the award again, upon a ſuggeſtion of the arbitrator's miſtake in point of law upon the conſtruction of a contract between the parties. *Chace* v. *Weſtmore*, *H.* 51 *G.* 3 357

BAIL.

1. In bailable cauſes for any ſum exceeding 1000*l.* it ſhall be ſufficient for the bail above to juſtify in 1000*l.* beyond the ſum ſworn to. *Reg. Gen*, *M.* 51 *G* 3. 62

2. Where the plaintiff, after arreſting and holding the defendant to ſpecial bail for 50*l.*, took 20*l.* out of court which the defendant had paid in, and ſtayed further proceedings · held that that did not warrant an application for coſts on the part of the defendant, by the ſtat. 43 *G.* 3. *c* 46 *ſ.* 3 againſt frivolous and vexatious arreſts, which authorizes coſts to be awarded to a defendant if the plaintiff do not *recover* the ſum for which he held the defendant to bail, and had *no reaſonable or probable cauſe* for holding him to bail to that amount. *Rouveray* v. *Aleſſon*, *M.* 51 *G.* 3 190

3. If defendant put in ſpecial bail within four days in a town cauſe, he is entitled to plead in abatement, provided ſuch bail be afterwards perfected in time; though he had before put in other bail, and given notice of juſtifying, but had withdrawn them in time. *Hopkinſon* v. *Henry and Another*, *M.* 51 *G.* 3. 170

4. The defendant having been ſued and held to bail by a wrong chriſtian name; but the plaintiff having declared againſt him, and bail having been put in and perfected for him by his right name; the bail cannot afterwards object to the irregularity upon a motion to enter an exoneretur upon the bail-piece. *Clark* v. *Baker*, *H.* 51 *G.* 3. 273

5. Time refuſed to be enlarged for the bail to render their principal, on an affidavit that he was a lunatic; it not appearing that he was in ſuch a ſtate as to occaſion any immediate peril of life either to himſelf or thoſe about him. *Cock* v. *Bell*, *H.* 51 *G.* 3. 355

6. The defendant being in cuſtody of a meſſenger under an order of the Secretary of State for the purpoſe of being ſent out of the kingdom by virtue of the alien act, 41 *G* 3 *c.* 155., the Court refuſed to iſſue a habeas corpus, on the application of his bail, to bring him up, that they might render him in their own diſcharge, on account of the public inconvenience, and probable riſk of his paſſage, which had been taken in a ſhip immediately about to ſail to his deſtined port. But they alſo refuſed, while he was ſtill in the kingdom, and might poſſibly be ſet at large again, to enter an exoneretur on the bail-piece: but they ſaid they would remember that the ſituation of the bail was without any fault of theirs, if any proceedings were taken againſt them in the mean time. *Folkein* v. *Critico*, *E* 51 *G.* 3 457

7. For the purpoſe of fixing the bail on ſcire facias, the capias ad ſatisfaciendum againſt the principal muſt lie the *four laſt* days in the office before the return: and the bail having once been prepared to render their principal

principal in time, which they then omitted to do, in consequence of a rule nisi taken out by them on the suggestion of the Court, with a view to an arrangement out of court between the parties, (the principal being a lunatic,) which rule was afterwards discharged without providing for the bail to be placed in the same situation that they were in before; the Court, in a subsequent term, permitted the bail to take the above objection to the regularity of the proceedings, though they had before, in the same term, before they were aware of this objection, brought forward another objection, which was overruled. *Cock* v. *Brockhurst and Another*, *E.* 51 *G.* 3. 588

BAILMENT.

1. If a thing be deposited by one, with the authority of another, and received by the bailee, to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. But where it only appeared that it had been agreed between the assignor and the assignee of a lease, that, to save the expence of a counterpart, it should be deposited in the hands of a third person, and the assignee afterwards delivered it to the bailee to keep, but without mentioning that it was on the joint account; and no communication was made of the deposit to the assignor, who never interfered further in the matter; but the defendant afterwards (with the privity of the bailee, who acted as his agent,) procured an illegal and void conveyance of the property in it from the assignee: held that the assignee or his legal representatives might alone maintain trover for it, after demand and refusal. *May and Another, Assignees of Taylor a Bankrupt*, v. *Harvey*, *H.* 51 *G.* 3. 197

BANK-NOTES.

1. A stakeholder receiving country bank-notes as money, and paying them over wrongfully to the original staker, after he had lost the wager, is answerable to the winner in an action for money had and received to his use. *Pickard* v. *Bankes*, *M.* 51 *G.* 3. 20

2. Bank-notes cannot be followed by the legal owners into the hands of of bonâ fide holders for a valuable consideration without notice. Therefore where a trader, after a commission of bankrupt issued against him, wishing to redeem a bill of exchange which he had before remitted to his bankers, to whom he was indebted much beyond the amount, secretly employed an unknown agent, in whose hands he placed for that purpose 4 other bills of about the same value; and such agent after endeavouring in vain to prevail on the banker to take in exchange such 4 bills for the one, (which application was made as from and in the names of third persons, though seconded by a letter from the trader to the bankers, received by them about the same time,) passed off the 4 bills in the market, and obtained Bank-notes for the same, with which Bank-notes he took up the first bill out of the banker's hands in the usual way: held that the assignees of the bankrupt trader could not recover from the bankers the amount of such Bank-notes, the produce of the 4 bills, part of the bankrupt's estate; though disposed of by him after his bankruptcy; the bankers having bonâ fide for a valuable consideration, and without notice of the true owners, received such Bank-notes. *Lowndes and Others, Assignees of Lees, a Bankrupt*, v. *Anderson and Others*, *M.* 51 *G.* 3. 130

3. The

3. The holder of a Bank-note is primâ facie entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privity. But where a bank-note for 500*l.* had been fraudulently obtained by some person unknown; and on its being presented for payment some time afterwards by an agent of a foreign principal, information was given of the fraud; and the principal was desired to inform the Bank how he came by it; but the only account he would give of it was that he had received it in payment of goods from a man dressed in such a way, of whom he knew nothing; and it was further proved that Bank-notes of so large a value were not usually circulated in that foreign country: this was held to be sufficient evidence to be left to a jury of the principal's privity to the original's fraud, in an action of trover brought by his agent to recover it from the bank who had detained it under the authority of the original owner, to whom it properly belonged. And the question was not altered by the agent, who received it on account, having, after notice, made payments for his principal, which turned the balance in favour of such agent. *Solomons* v *The Bank of England, M.* 32 *G.* 3. 135

BANKRUPT.

1. Bank-notes cannot be followed by the legal owners into the hands of bona fide holders for a valuable consideration without notice. Therefore where a trader, after a commission of bankrupt issued against him, wishing to redeem a bill of exchange which he had before remitted to his banker, to whom he was indebted much beyond the amount, secretly employed an unknown agent, in whose hands he placed for that purpose four other bills of about the same value; and such agent, after endeavouring in vain to prevail on the bankers to take in exchange such four bills for the one, (which application was made as from and in the names of third persons, though seconded by a letter from the trader to the bankers, received by them about the same time,) passed off the four bills in the market, and obtained Bank-notes for the same, with which Bank-notes he took up the first bill out of the bankers' hands in the usual way: held that the assignees of the bankrupt trader could not recover from the bankers the amount of such Bank-notes, the produce of the four bills, part of the bankrupt's estate; though disposed of by him after his bankruptcy; the bankers having bonâ fide for a valuable consideration, and without notice of the true owners, received such Bank-notes. *Lowndes and Others, Assignees of Lees, a Bankrupt,* v. *Anderson and Others, M.* 51 *G.* 3. 130

2. Bills of exchange to the amount of 100*l.*, drawn and issued by a trader before an act of bankruptcy, but becoming due afterwards, are sufficient, when due, to found a petition for a commission of bankrupt against him. But note, the bankrupt was in fact indebted to different persons at the time of the act of bankruptcy in more than 100*l.*, even allowing the rebate of interest upon the bills, calculated back to that period. *Brett, Assignee of Harrison, a Bankrupt,* v. *Levett, H.* 51 *G.* 3. 218

3. Want of notice to the bankrupt drawer of the dishonor of one of the bills may be supplied by evidence of his acknowledgment to the holder, when asked if the bill would be paid, that it would not; though such acknowledgment were made

made after the act of bankruptcy committed ib. 213

4. The plaintiff having accepted a bill, payable at a future day, for the accommodation of the defendant, the latter afterwards, and before the bill became due, committed an act of bankruptcy, followed by a commission, which was afterwards superseded; and time was given to the bankrupt by his creditors; and the plaintiff thereupon accepted another bill for the same debt, with the addition of interest and stamp: held that this was a continuation of the same suretyship by the plaintiff for the defendant, which existed before the act of bankruptcy and the first commission: and a second effectual commission having afterwards issued upon the same act of bankruptcy, before the plaintiff's second acceptance became due, which was paid when due; held that the amount was proveable as a debt under such commission by virtue of the stat 49 *Geo.* 3. c 121. *s* 8., and was consequently barred as a personal demand against the bankrupt by his certificate. *Stedman* v. *Martinnant*, *E.* 51 *G.* 3. 427

5. Where a sale note for the purchase of 50 tons of *Greenland* oil was delivered by the sellers' broker to the purchasers to be paid for by their acceptance payable at a future day; and they afterwards received from the sellers an order on their wharfingers for the delivery of the 50 out of 90 tons of their oil; yet as the custom of the trade was for the casks to be searched by the sellers' cooper, and for a broker on behalf of both parties to ascertain the footdirt and water in each, (for which allowance was to be made) and then the casks were to be filled up by the sellers' cooper at their expence; all which was to precede the delivery to the buyers: held that the sale was not complete to pass the property; but that the sellers, on the insolvency and subsequent bankruptcy of the buyers before such acts done and delivery made, might countermand it. *Wallace and Others, Assignees of Anderson and Eades, Bankrupts*, v. *Breeds and Another*, *E.* 51 *G.* 3. 522

BASTARDY, ORDER OF.

1. One who is de facto guardian of the poor of a parish, united with other parishes under the stat 22 *G.* 3. c. 83. for the better relief and employment of the poor, and who is received and acknowledged by the parish as guardian, though not legally appointed such under the statute, is yet competent to apply in that character to a justice of the peace to take the examination of a single woman with child, in order to filiate the bastard; which, by the stat. 6 *Geo.* 2. *c.* 31. *s.* 1. is directed to be made *upon application by the overseers of the poor*, in whose place such guardian is appointed: and he is also competent to apply to the justice for a summons against a reputed father for not obeying an order of bastardy, which, by stat. 49 *G.* 3. *c.* 68. *s* 4 is directed to be made *upon complaint by any one of the overseers of the poor.* *The King* v. *Martyr and Fulham*, *M.* 51 *G.* 3. 55

2. And though the latter statute direct the magistrate, upon such complaint and proof upon oath of the order for payment of maintenance, and non-payment thereof, *to issue his warrant to apprehend* the reputed father; yet it is proper for the justice to issue a *summons* in the first instance to the party charged, to attend and shew cause. ibid.

3. The stat. 18 *Eliz.* c. 3. *s.* 2. concerning "bastards left to be kept at "the charges of the parish where "they are born," enacting, "That "two justices of the peace in or "next

"next unto the limits where the "parish church is, within which parish such bastard shall be born, "upon examination, &c. shall take "order as well for the punishment "of the mother and reputed father, "as also *for the better relief of every "such parish,"* &c.: held that an order of bastardy, not appearing to be made on complaint of the parish where the child was born; but, on the contrary, stating that she was a casual poor there; is bad: for non constat but that she may have been born in a parish in another county out of the jurisdiction of the justices making the order. *The King* v *St. Mary's, Nottingham, E.* 10 *G.* 2. 57

4. But there is no objection to the bastard, being of years of discretion, giving evidence on oath as to her reputed father; nor to the reputed father being examined, if he choose to admit the fact; though he be not compellable to answer. ibid.

5. An order of bastardy is only binding on the reputed father to indemnify the parish in which the bastard is born, till the bastard has acquired another settlement for herself elsewhere. ibid.

6. On quashing an order of bastardy defective in form, the Court, according to the practice, took the reputed father's recognizance to appear at the next Session. ib. 59

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. If one partner draw or indorse a bill in the partnership firm, it will primâ facie bind the firm; although passed by the one partner to a separate creditor in discharge of his own debt; unless there be evidence of covin between such separate debtor and creditor, or at least of the want of authority, either express or to be implied, in the debtor partner to give the joint security of the firm for his separate debt. But held, that no sufficient circumstance appeared to raise any presumption adverse to the separate creditor taking such joint security, in a case where the bill appeared to have been drawn in the name of the firm to their own order 18 days before the delivery of it to the separate creditor, and to have been accepted and indorsed before such delivery, and to have been drawn for a larger amount than the particular debt; and where, though the indorsement was in fact made by the hand of the debtor partner, yet it did not appear that that fact was known to the separate creditor at the time; and this, too, in a case where direct evidence might have been given of the covin or want of authority, if it existed. For the action being brought by the separate creditor against the acceptor, either of the partners might have been called as a witness by the defendant, to disprove the authority of the debtor partner to give the joint security; for though if the separate creditor recovered against the acceptor, he would have his remedy over against the firm; yet the innocent partner would have his remedy over against the other. And the bankruptcy of the debtor partner in the mean time does not vary the question of competency. *Ridley and Another* v. *Taylor, M.* 51 *G.* 3. 175

2. Where the defendant lent his indorsement on a promissory note to the drawer, which note was payable on demand, for the purpose of enabling him to raise money on that security from the plaintiffs, his bankers, who agreed to make advances thereon for six months; held, that the bankers, who had renewed their advances at the end of the six months without the knowledge or consent of the defendant, could not

recover upon the note thus indorsed by him, without proof of a demand on the drawer, and a regular notice of the dishonor to the defendant. *Smith and Others* v. *Becket*, *M.* 51 *G.* 3 187

3. Bills of exchange to the amount of 100*l.*, drawn and issued by a trader before an act of bankruptcy, but becoming due afterwards, are sufficient when due to found a petition for a commission of bankrupt against him. But note, the bankrupt was in fact indebted to different persons at the time of the act of bankruptcy in more than 100*l*, even allowing the rebate of interest upon the bills calculated back to that period *Brett*, *Assignee of Harrison, a Bankrupt*, v. *Levett*, *H* 51 *G.* 3. 213

4. Want of notice to the bankrupt drawer of the dishonor of one of the bills may be supplied by evidence of his acknowledgment to the holder, when asked if the bill would be paid, that it would not; though such acknowledgment were made after the act of bankruptcy committed. ibid.

5. The indorsee of a promissory note may recover upon it against the payee and indorser, on evidence of a promise to pay it made some time after the dishonor of the note by him to a subsequent indorsee, who then held it; without direct proof by the plaintiff, that due notice of the dishonor was given to such payee and indorser. *Potter* v. *Rayworth*, *E.* 51 *G* 3. 417

6. The plaintiff having accepted a bill payable at a future day for the accommodation of the defendant, the latter afterwards, and before the bill became due, committed an act of bankruptcy followed by a commission, which was afterwards superseded; and time was given to the bankrupt by his creditors; and the plaintiff thereupon accepted another bill for the same debt, with the addition of interest and stamp: held that this was a continuation of the same suretyship by the plaintiff for the defendant, which existed before the act of bankruptcy and the first commission And a second effectual commission having afterwards issued upon the same act of bankruptcy, before the plaintiff's second acceptance became due, which was paid when due: held, that the amount was proveable as a debt under such commission, by virtue of the stat. 49 *G.* 3. *c.* 121. *s.* 8. and was consequently barred, as a personal demand against the bankrupt, by his certificate. *Stedman* v. *Martinnant*, *E.* 51 *G* 3. 427

7. The acceptor continues liable, though no demand was made till 3 months after the bill was due, and when the drawer had become insolvent. *Anderson* v. *Cleveland*, sittings at *Guildhall* after *Easter* 1769, cor. Lord *Mansfield* C. J.

8. In a count against the acceptor of a bill of exchange, stated to be *accepted payable at S. and Co's.* it is sufficient to allege, *generally*, a request by the plaintiff to the defendant to pay the bill, without alleging that it was presented for payment *at the particular place*. *Fenton* v. *Goundry*, *E.* 51 *G.* 3. 459

9. And no objection can be taken on demurrer, not assigning at least the cause specially, that after stating the day on which the bill was drawn, which was made payable at a *future* day, the count alleged that *afterwards, to wit, on the same day*, &c. the demand of payment was made. ibid.

10. The holder in *America* of two bills of the same tenor, having transmitted them to his agents here to present them for acceptance, and *receive* the money when due, and *pay over* a part of it to the plaintiff; while the bills so remained in his agents' hands, agreed with the defendant, the

the indorser, (who had lent his indorsement on each to the drawer, from whom the holder received them,) that upon payment of one of the bills, he should be exonerated from both. In the mean time, the bills having been presented for acceptance by the agents and dishonored; *after the dishonor*, the agents, not knowing of such agreement between their principal and the indorser, assigned one of the dishonored bills to the plaintiff, who was informed of the dishonor, and who received it liable to all its infirmities, but without notice of such agreement: held, that the bill so received by the plaintiff was bound by the agreement; and that the defendant, having afterwards taken up and discharged the other bill, which had remained in the hands of the same agents, was discharged from both. *Crossley* v. *Ham*, *E.* 51 *G.* 3. 498

11. The indorsee of a bill of exchange, made payable 65 days after date, which was issued by the drawer, and indorsed by the payee, who died before the day when it bore date, may make title through such indorsement to recover on the bill against the drawer. *Pasmore* v. *North*, *E.* 51 *G.* 3. 517

BILLS OF LADING,

See Freight.

BOND,

See Assault, 1. Covenant, 1. Pleading, 1, 2.

The plaintiffs and the defendant having each lodged their respective *India* bonds with the same bankers, who afterwards privily, and without the defendant's authority, sold his bonds, and upon his demand of them, delivered up to him the *India* bonds of the plaintiffs to the same total amount, and payable to the same obligee, (being always the treasurer of the company, who indorses such bonds in blank before they are circulated,) but having different numbers, and for different separate sums, and therefore manifestly distinguishable from his own bonds; though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for these: held, that the defendant having sold the plaintiffs' bonds so received from his own agents, who had acted malâ fide in passing them to him, was liable to answer over to the plaintiffs for the amount in an action of assumpsit for money had and received to their use. *Glyn, Bart.* v. *Baker*, *E.* 51 *G.* 3. 509

BRIDGES.

1. The inhabitants of the county, being primâ facie liable to repair all public bridges within it, are therefore, as it seems, bound to repair an ancient *horse-bridge*, unless they shew that others are bound to repair the same. *The King* v. *The Inhabitants of the County of Salop*, *M.* 51 *G.* 3. 95

2. The *Medway* Navigation Company being empowered, under a local act, (16 and 17 *Car.* 2.) to make the river navigable, and to take tolls; and "to amend or alter such bridges "or highways as might hinder the "passage or navigation, *leaving* them "or others as convenient in their "room," &c.; and they having 40 years ago destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place, are bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit. *The*

 King

King v. *The Inhabitants of Kent*, *H.* 52 *G.* 3. 220

BRISTOL,

See Stamp, 1.

BY-LAW,

See Corporation.

CALICO-PRINTER,

See Conviction, 2.

CERTIORARI.

1. The Court refused a certiorari to remove an indictment for a misdemeanor, and proceedings thereon at the assizes, after conviction and before judgment, which was prayed for the purpose of applying for a new trial, on the Judge's report of the evidence, upon the ground of the verdict being against evidence and the Judge's direction. *The King* v. *The Inhabitants of the County of Oxford*, *E.* 51 *G.* 3. 411

2. A certiorari will not lie to the sessions to remove a conviction for a misdemeanor before judgment; for the fine being uncertain, the Court above cannot tell how to assess it. Otherwise where the punishment is certain. *The King* v. *Nicholls*, *M.* 18 *G.* 2. 414

CHARTER-PARTY.

1. Under the common printed form of the *East India* Company's charter-parties, the company are warranted in assisting and acting conjointly with his majesty's government, at their requisition, in sending their chartered ships upon a warlike expedition against the king's enemies, under the command of the king's officers placed on board the same. And a ship of that description is still under the charter-party, though alterations were ordered to be made in her upper works by the company, to enable her to carry a larger number of guns, &c. than her stipulated force; and though a king's officer assumed the command of her, and hoisted the king's broad pendant on board. *Dobree* v. *The East India Company*, *H.* 51 *G.* 3. 290

2. The usual clause in a bill of lading engaging the master of the ship to deliver the goods to the consignee or his assigns, *he or they paying freight for the said goods*, is introduced for the benefit of the master only, and not for the benefit of the consignor, and therefore the master is not bound to the consignor to withhold the delivery of the goods unless the consignee or his assigns pay the freight. Nor does it vary the case, that the consignor was also the charterer of the ship. Therefore where the master covenanted in a charter-party to proceed with certain goods from *London* to *Tangiers*, there to apply "to the correspondents, factors, or agents of the charterer" for orders whether he was to proceed to *St. Lucar* or *Cadiz*; and that pursuant to the orders he would make a right and true delivery to the correspondents, factors, or agents of the charterer, agreeably to bills of lading; and the charterer covenanted that he would pay to the master *immediately* on a right and true delivery of the cargo, in full for the freight of the ship, at a certain rate in sterling money; and afterwards bills of lading were signed and delivered, making the cargo deliverable at *Tangiers* and *St. Lucar* to *J. P.* (the charterer's agent at *Tangiers*,) or his assigns, he or they paying freight for the said goods so much in sterling money, at the current exchange at *Cadiz* or *London*; and the master was ordered by *J. P.* at *Tangiers* to deliver the cargo at *Cadiz*, (by which it was

averred, that the master was prevented from delivering the same to any of the correspondents, factors, or agents of the charterer's at *Tangiers* or *St Lucar*, agreeably to the bills of lading;) and did deliver it at *Cadiz* to *B. P.* the agent of the defendant in that behalf, according to the charter-party: the master, who had not received the freight from *B. P.* on delivery of the cargo to him, was held entitled to recover it from the charterer in an action of covenant upon the charter-party. For neither the fixing of the rate of exchange in the bills of lading varies this from the common rule above-mentioned, nor the omission in the bill of lading of going to *Cadiz*, which was named in the charter-party, together with *Tangiers* and *St. Lucar*; for such omission only relieved the master (who was to deliver agreeably to the bills of lading) from going to *Cadiz*, but did not take from him the power of going there under the charter-party: and again *B P.* who was only averred to be the agent of the charterer, is either to be considered as virtually the *assign* of *J. P.*, to whom or to whose assigns the bill of lading required the delivery to be made; or *J. P.* must be taken, in default of making any appointment, as having refused to accept the cargo, and then the master properly delivered it to the agent of the charterer and consignor himself, so as to found the action of covenant on the charter-party. *Shepard* v. *De Bernales*, *E.* 51 *G.* 3. 565

CHURCHWARDEN,

See Parish Officer, 2.

COLLIERIES,

See Covenant, 1.

COMMON.

1. Parchment writings preserved amongst the muniments of a manor, dated in 1698 and 1717, purporting to be signed by many persons, copyholders of the manor, stating an unlimited right of common in the commoners, which having been found inconvenient, they had agreed to stock the common in a certain restricted manner, is evidence of reputation as to the general right, sufficient to destroy the restricted right set up by the plaintiff, a copyholder, in an action on the case against a freeholder of the manor for overstocking the common beyond such stint: although it was objected that the instrument was not proved to have been signed by a majority of the copyholders of the manor, nor that the plaintiff held the copyhold tenement of any one of those who had signed it. *Chapman* v. *Cowlan*, *M* 51 *G* 3. 10
2. Where one of two adjoining commons, with common of vicinage, was enclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other; yet as the separation was not complete, so as to prevent the cattle straying from one to the other by means of the highway, the common by vicinage still continued. *Gullet* v. *Lopes*, *Bart.* *H.* 51 *G.* 3. 348

CONSPIRACY.

1. Indictment against several for conspiring together, *by indirect means*, to prevent one *H B.* from exercising the trade of a tailor, held well; for the indictment would have been good without those words. *Rex* v. *Eccles and Others*, *M.* 24 *G* 3. *B. R.* 230
2. Where two conspire, and one dies, the other may still be indicted for a conspiracy.

conspiracy. *The King* v. *Nicholls*, *M.* 17 *G.* 2. 412

CONTRACT,

See VARIANCE, 2, 3.

CONVEYANCE,

See TITHES, 1.

CONVICTION.

1. The stat. 34 *G.* 3 *c* 68. *s.* 18. giving a summary conviction against any master of a vessel who, having received the certificate of its registry, shall wilfully *detain and refuse to deliver up the same to the proper officers empowered to make registry*, &c. on the requisition of the owner or major part of the owners, will not authorize the conviction of a master, who did not comply with the requisition of *the owner*, (though the *sole* owner,) to deliver up such certificate to *him*; though expressed to be for the purpose of his providing the necessary indorsement to be made on it at the custom-house upon the transfer of the ship to him. *The King* v. *Pixley*, *M.* 51 *G* 3. 91

2. A conviction of a journeyman calico-printer upon the stat. 39 & 40 *G.* 3. *c.* 106. and 41 *G.* 3. *c.* 38 for refusing to work, &c. made by justices of the peace of the county of *Surrey*; stating, that the defendant was employed by *G. S.* &c. *of* W. *in the said county*, in the manufacture or business of a calico-printer, carried on by them *at* W. aforesaid; and that *whilst* the defendant was such workman, and was employed as aforesaid, without reasonable cause, *he refused to work* with one *J. B.*, then also being a workman employed by the said *J. S* &c. in the said manufacture, &c *carried on* by them *at* W. *aforesaid*; is bad, for want of stating, that *the defendant's refusal to work*, &c, which was the criminal act charged, was made *at* W. within the jurisdiction of the convicting magistrates.

And this is not helped by a summary mode of conviction given by the statute; in one of the blanks of which it is required to state the offence, without any blank specifically pointing to the *place*. *The King* v. *Hazell*, *M.* 51 *G.* 3. 139

COPYHOLD,

See COMMON.

CORPORATION.

1. A prescriptive right in the eldest son of every burgess born in *Nottingham*, and in the younger sons of every burgess born in *Nottingham*, and having served a seven year's apprenticeship to any trade, and in every person having served a seven years' apprenticeship in *Nottingham* to any burgess of *N.* to be admitted a burgess of the town, on his attaining 21, was holden not to exclude the incidental power arising by implication of law to the corporation at large, to secure their perpetual succession, by voluntary elections of burgesses ad libitum: and this, though it was averred that *N* had always been and yet is a populous town, containing numerous resident and trading burgesses; and that by the prescriptive modes of supply by birth and servitude, the succession of a sufficient and large number of burgesses *is* fully secured: for non constat that these sources had *at all times* been sufficient during the existence of the corporation, without occasional supplies of burgesses by election, or even that they were so at the time of the defendant's election; and they could not have operated at all for some years after the creation of the corporation: and therefore no presumption can be made from thence that the crown meant to exclude the incidental power of the corporation to make

voluntary

voluntary elections of burgesses in aid of such prescriptive modes of supply. *The King* v. *Bird*, *H.* 51 *G* 3. 367

2. Whether the power of making such voluntary elections be incidental to the corporation at large, or exist in them by prescription; it is competent for them to delegate it to a select part of themselves. But ibid.

3. They cannot delegate such power to any stranger: and the recorder of the town must be taken to be such, if he be not stated to be a burgess. ibid.

4. As such select body is the creature of the corporation, its constitution and mode of acting may, it seems, be modelled (with the exception before stated) according to the pleasure of its maker: and where the corporation (consisting primarily of the mayor and burgesses, who were directed by charter to elect aldermen from among themselves,) transferred the right of electing burgesses to a select body, consisting of the mayor and aldermen, of whom the major part must attend; 18 livery or cloathing burgesses, of whom 9 were sufficient to attend; together with the recorder, if a burgess, and if choosing to attend; and 6 of the burgesses at large, if they choose to attend; but the select body might proceed without either the 6 burgesses or the recorder, if they did not attend: held that this was a reasonable and valid by law. ibid.

COSTS.

1. Under the stat. 5 *W.* & *M.* c. 11. *s.* 2 & 3. requiring a defendant, removing an indictment from the Sessions by certiorari, to find two sufficient manucaptors, who shall enter into a recognizance in 20*l*. conditioned to appear, plead, and try, &c; and that if the defendant be convicted, &c., the Court shall give reasonable costs to be taxed, &c; *and that the said recognizance shall not be discharged till the costs so taxed shall be paid*; the amount of the costs to be taxed is not limited by such recognizance, which is only a further security for them; and the Court will not discharge the recognizance till the taxed costs are paid to the prosecutor. *The King* v. *Teal and Others*, *M.* 51 *G.* 3. 4

2. The practice is, to take the recognizance in 20*l*. from each of the manucaptors. ibid.

3. The statute, giving the prosecutor an attachment for recovery of his costs within ten days after demand and refusal, means ten entire days. ibid.

4. The Court refused on motion to discharge an infant plaintiff, who had sued without prochein amy or guardian, and was in execution for the costs. *Finley* v. *Jowle*, *M.* 51 *G.* 3. 6

5. Coupling the stat. 35 *G* 3. *c.* 101. (which enables two justices to suspend orders of removal on account of the sickness of the paupers, and to give the costs of such suspensions, with an appeal against such costs if they amount to 20*l*.,) with the stat. 3 *W.* & *M.* c 11. *s.* 9. (which gives an appeal to the party *grieved* by any determination of the justices respecting the settlements of paupers by the means there mentioned;) appeals lie against an order of removal which was suspended, and against a subsequent order for costs; notwithstanding the death of the pauper before any removal of him in fact made; and though the costs were under 20*l*.; such order for costs attaching by consequence a *grievance* on the parish to which the order of removal was made, if the pauper were not settled in it. *The King* v. *The Inhabitants of St. Mary-le-Bone, in Middlesex*, *M.* 51 *G.* 3. 51

6. An

6. An order of sessions, awarding such costs as other persons should adjudge to be reasonable, is bad. *The King* v. *St. Mary's, Nottingham, E.* 10 *G.* 2. 57

7. Where the plaintiff, after arresting and holding the defendant to special bail for 50*l.* took 20*l.* out of court, which the defendant had paid in, and staid further proceedings: held, that that did not warrant an application for costs on the part of the defendant, by the stat. 43 *G.* 3. *c* 46. *f.* 3. against frivolous and vexatious arrests; which authorizes costs to be awarded to a defendant if the plaintiff do not *recover* the sum for which he held the defendant to bail, and had *no reasonable or probable cause* for holding him to bail to that amount. *Rowveroy* v. *Alefson, M.* 51 *G.* 3. 90

8. Where a nonsuit is set aside upon payment of costs, such payment is made a condition precedent to the setting aside the nonsuit; and without it the plaintiff cannot proceed to another trial. *Nichols* v. *Bozon, M.* 51 *G* 3. 185

9. Trespass for breaking and entering the plaintiff's messuage and yard, and passing and repassing therein: plea, 1st, not guilty as to the force and arms, &c.; and, 2dly, as to the residue, a justification of a right of way over the locus in quo *at all times*; and, 3dly, a like justification *in the day time.* Replication, taking issues on the two rights of way, and new assigning extra viam, &c; to which there was judgment by default; and after verdict for the plaintiff on the first special issue, for 1*s.*, and damages assessed also on the new assignment, and *a verdict for the defendant* on the not guilty, except, &c. *and on the second special issue;* held that the defendant was entitled to the general costs of the trial; because the plaintiff was not obliged to go to trial, but should have let judgment go by default on the issue upon the limited right of way, which was found against him. *Thornton* v. *Williamson, T.* 50 *G.* 3. 191

COURT OF REQUESTS,

See London Court of Requests.

COVENANT.

1. Where lessees of land and of coal mines found or to be found therein, covenanted *forthwith to proceed to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries*, and, as in such cases was usual and customary, and to erect fire engines for the purpose, by the 24th of *June* 1806, *or in default thereof to pay so much to the lessor as arbitrators should award;* and after the day past, without any new pits sunk, &c. the parties named arbitrators to award concerning the damage, loss, and delay to the lessor, if any, and whether any rent or other satisfaction should be made to him on that account; and the lessees gave bond to the lessor conditioned to perform the award: and afterwards the arbitrators awarded *that the lessees had not performed their covenant*, by not having proceeded to sink for the said coal *as far as could and ought to be accomplished*, &c. (in the words of the covenant) on or before the 24th *June* 1806; for which they awarded to the lessor 150*l.* on account of all damages and losses then incurred on account of such breach: and further, *that the lessees should sink coal mines and erect fire engines for getting the coals demised, on or before the 24th* June 1807; and in default thereof, *and until the same should be done, they should pay a yearly rent of* 200*l. to the lessor,* as a compensation for the lord's share reserved under the lease: held that to an action on the bond, it

it was sufficient answer by the lessees to save the condition, that they had paid the 150*l.* awarded for the breach of the covenant up to the 24th *June* 1806: and as to the subsequent period, from thence till the 24th *June* 1807, that on divers days between, &c. *they did well and truly sink for coal in the lands demised, as far as could and ought to be accomplished*, &c. (in the words of the covenant,) and were ready and willing to have sunk and completed the pits, and to have erected the necessary fire engines, &c. within the time limited by the award; *but that at the time of making the lease, and from thenceforth, there were no mines of coal under the lands as could or ought to be worked by any person acquainted with the nature of collieries, or as in such cases it was usual or customary to work, or as would have defrayed the necessary expences of working and getting the same: all which premises the defendants ascertained and proved by due and sufficient experiments and trials then and there made.* But leave was given to amend by taking issue on the sufficiency of the experiments. *Hanson* v. *Boothman and Others*, *M.* 51 *G.* 3. 22

2. The plaintiff declared in covenant, and set out, first, an indenture, whereby the defendant, the original proprietor of a medicine, bargained, sold, and assigned all his right, interest, and property in it to a third person, subject to a covenant by the assignee to pay him one-third of the profits during his and his wife's lives; and also covenanted with the assignee *that he would not thereafter, by himself, or jointly with any other, prepare or sell, or engage with any other person in preparing or selling the said medicine*, &c.: and then the plaintiff set out a second indenture, whereby the first assignee assigned all his right, interest, and property in the medicine to the plaintiff, subject to the covenant of reservation: and then the plaintiff set out *a third indenture between him and the defendant*, reciting the two former, and *that he had agreed with the defendant for the absolute purchase of all his right, share, and interest as well in the said medicine, as in the one-third share so reserved to the defendant*; by which indenture the defendant bargained, sold, and assigned to the plaintiff all *that third share, and all other* share or proportions, right, title, interest, claim, or demand whatsoever of the defendant *to the said medicine*, or to the profit, &c. *habendum* to the plaintiff in like manner as the defendant might have done if those presents had not been made: with a covenant that the plaintiff might, at all times thereafter, *prepare and sell the medicine in the name of the defendant, and receive the profit thereof to his own use*; and another covenant *for further assurance*, for the more perfect and absolute assigning and assuring to the plaintiff *the said medicine, and all the profits arising from the sale thereof.* And then the plaintiff proceeded to assign breaches *in the words of the first indenture between the defendant and the first assignee* that the defendant prepared and sold the medicine, and also engaged with others in preparing and selling it for his own profit, &c.; and charged some of these breaches to be *contrary to the first indenture, and to the defendant's covenants therein with the first assignee*; but the second breach was charged to be *contrary to the last indenture and to his covenant with the plaintiff.* Held, that the last indenture alone (without the confirmation which, however, the construction of it received from the two former recited therein,) shewed an intention in the defendant, and the words of it were large enough, to assign to the plaintiff not only the *one-third* share of the

the profits reserved by the first indenture, but *all* the defendant's right, title, and interest in the medicine, and all the future profits arising from the sale thereof; and that such assignment of all his interest and property in the medicine raised an *implied covenant*, that he would not prepare or sell the medicine, or engage with others in so doing, for his own profit: such preparation and sale being a retention and exercise of the right of preparing and vending the medicine of which he was once the proprietor, in derogation of his deed, whereby he had conveyed such right to the plaintiff. And held, that the second breach was well assigned, which was charged to be *against his covenant in the last deed with the plaintiff. Seddon* v. *Senate*, *M.* 51 *G.* 3. 63

3. A covenant in an indenture of lease for 21 years from Michaelmas, that the tenant should not, during the term, cut down any of the coppice *of less than* 10 *years growth*, or at any unreasonable time of the year, *but at the end of the term the landlord agreed to pay to the tenant the value of all* SUCH *growth of coppice as should be then standing and growing*; was held, according to its grammatical construction [uncontrolled by any other part of the instrument shewing a different intent] to bind the landlord, to whom the words of the covenant were to be attributed, to pay the tenant for the value of all the coppice of *less than* 10 *years growth*, left standing on the demised premises at the end of the term; though no special consideration appeared on the face of the deed for the landlord's agreeing to make a compensation to the tenant for the value of such part of the coppice, which the tenant was not entitled to cut. One judge, who dissented, thought that the words "*such* growth" referred to a growth of 10 years, though inaccurately expressed; founded on a strong presumption of the meaning of the parties, as gathered from the restriction on the tenant not to cut coppice of less than 10 years growth, and to the period of the year when the tenancy would end; which was before the cutting season, but after a portion of the coppice would be of 10 years growth. *Love* v. *Pares*, *M.* 51 *G.* 3. 80

4. The defendant having covenanted in an indenture to pay the plaintiff 300*l.* at the end of a twelvemonth, and in the mean time, and until the payment thereof, to pay interest for it at 5 per cent.; it is no answer to an action of debt for the 300*l.* and interest accrued thereon, to plead that by the same indenture it was, amongst other things, covenanted that the defendant should pay the property tax, *payable for and in respect of the said* 300l.: for the plea does not shew that the covenant for the payment of the property tax attached on the interest payable for the 300*l.* principal; and the covenants, as there exhibited, appear to be independent; and therefore though the latter should be void by the property tax act 46 *Geo.* 3. *c.* 65. *s.* 115. avoiding all contracts, covenants, &c. for the payment of any *interest*, &c. in full, without allowing the deduction of the tax as directed by the act; yet that would not avoid the other independent covenant in the deed for the payment of the 300*l.* and interest. *Wigg and Another, Executors of Collier*, v. *Shuttleworth*, *M.* 51 *G.* 3. 87

5 Part-owners of a ship having agreed, "each and every of them with the others and each and every of the others," that the ship should proceed on a certain voyage under the exclusive management and control of one of them, as ship's husband; and

and that after her return "a full account should be made of the said ship and her concerns," and the neat profits be divided in proportion, after deducting all charges; the duty of making out such account is cast upon the ship's husband; and for not doing so, and not dividing the neat profits, after deducting all charges, within a reasonable time after the ship's return, an action lies against him upon the agreement by each of the part-owners; though it be not averred in terms that the charges were or could have been ascertained before the action brought. *Ouston* v. *Ogle*, *E.* 51 *G.* 3. 538

CUSTOM-HOUSE OFFICER.

A custom-house officer has authority to seize uncustomed goods, with the carriage and horses carrying off the same, though out of the limit of the particular port of which he is denominated an officer in his deputation from the commissioners of customs. *The King* v. *Barfoot*, *E.* 51 *G.* 3. 506

DEBT,

See Covenant, 4.

DEMISE,

See Lease, 3.

DEVISE.

1. Under a devise of the residue of real and personal estate, (subject to the payment of debts and legacies) to the testator's son and daughter, *their heirs and assigns for ever, as tenants in common, and not as joint tenants;* but in case of the death of either, leaving child or children, the share of him or her so dying to go to his or her child or children; or if all should die before 21, such share to go to the survivor of the son or daughter for ever: but in case his son and daughter should be both dead *at the time of the testator's death*, without child or children; or leaving child or children, all of them should die under 21 and unmarried, and without child or children; then he gave the *whole* of his real and personal estate to his executors, upon certain trusts for other branches of his family; and then the will proceeded, as to the rest and residue of his estate and effects, *in case of the death of his son and daughter at the time before mentioned, and without child or children, and other the events aforesaid;* he gave the same to his brother in fee: held that the limitation to the children of the deceased son or daughter, or to the survivor of the two, was only a substitution in case of a lapse by the death of the testator's son or daughter *in his lifetime;* so that if both son and daughter survived him, he intended them to take the fee as tenants in common: if one died in his lifetime and left issue, such issue was to take the parent's share; or if there should be no such issue which should attain 21, the survivor of the son and daughter should take the whole: or if both died in his lifetime, and either left issue, such issue was to take: but if both died without issue in his lifetime, then the executors were to take on the trusts mentioned; remainder to his brother in fee. *Doe, Lessee of Lifford and Wife*, v. *Sparrow*, *H.* 51 *G.* 3. 359

2. Under a devise of land to the sisters of *J. H.* (generally) their heirs, &c. *as tenants in common*, and not as joint tenants, one of three sisters of *J. H.* who alone survived at the time of the devise made, and who also survived the testator, is entitled to take the whole. But even if she had been only entitled to a part, (whether a moiety or a third,) the residue would not have gone to the heir

heir at law, as in case of a lapsed devise; which supposes the deceased sisters to have been once capable of taking under the will; but to the residuary legatee, to whom was devised certain other lands, "and also all other the testator's lands, &c. not hereinbefore disposed of, &c. and all other his real and personal estate whatsoever which he might be possessed of or entitled to, &c." *Doe, Lessee of Stewart, v. Sheffield, E.* 51 *G.* 3. 526

EAST INDIES, AND EAST INDIA COMPANY,

See BOND, 1.

1. Under the common printed form of the *East India* Company's charter-parties, the company are warranted in assisting and acting conjointly with his majesty's government, at their requisition, in sending their chartered ships upon a warlike expedition against the king's enemies, under the command of the king's officers placed on board the same. And a ship of that description is still under the charter-party, though alterations were ordered to be made in her upper works by the company, to enable her to carry a larger number of guns, &c. than her stipulated force; and though a king's officer assumed the command of her, and hoisted the king's broad pendant on board. *Dobree and Others v. The East India Company, H.* 51 *G.* 3. 290
2. Though the cause of action accrued within the jurisdiction of the Supreme Court at *Calcutta*, while both the parties were resident there; and by the king's charter, granted in pursuance of the stat. 13 *G.* 3. *c.* 63. that court is authorized to exercise the same jurisdiction in civil cases as is exercised by the Court of K. B. within *England by the common law thereof:* and assuming that by such authority the provisions of the statute of limitation 21 *J.* 1. *c.* 16. *s.* 7., and 4 *Ann. c.* 16. *s.* 19. are transferred to *India*, as part of the law of *England*, auxiliary to the common law; yet by the express tenor of the savings in those statutes, as applicable to the courts here, the plaintiff's right of action upon an assumpsit is saved, if he (having returned home before the defendant) commence such action within six years after the defendant's return home, though more than six years had elapsed in *India* after the cause of action accrued there, and during the defendant's stay within the jurisdiction of the court in that country. *Williams, One, &c. v. Jones, E.* 51 *G.* 3. 439

EJECTMENT.

1. In ejectment, the premises being laid to be in *Farnham*, and proved to be in *Farnham Royal*, is not a fatal variance, unless it be shewn that there are two *Farnhams*. *Doe, d. Tollet, v. Salter, M.* 51 *G.* 3. 9
2. One who is put in possession upon an agreement for the purchase of land cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise; and even considering such lawful possession as a tenancy at will, the defendant's confession, (by entering into the common rule,) of a lease by the lessor to the nominal plaintiff, is not a constructive determination of the will whereon to maintain the ejectment. *Right, d. Lewis, v. Beard, H.* 51 *G.* 3. 210
3. A notice to quit at *Michaelmas* served personally on the tenant, who made no objection at the time, is primâ facie evidence from whence the jury may find that the tenancy commenced at that period. *Doe, Lessee of Clarges, Bart. v. Forster, E.* 51 *G.* 3. 405

4. Aliter,

4. Aliter, where the notice was not personally served on the tenant. Ibid.

EVIDENCE,

See Assault, 1. Insurance, 1, 2.

1. Parchment writings preserved amongst the muniments of a manor, dated in 1698 and 1717, purporting to be signed by many persons, copyholders of the manor, stating an unlimited right of common in the commoners, which having been found inconvenient, they had agreed to stock the common in a certain restricted manner, is evidence of reputation as to the general right, sufficient to destroy the restricted right set up by the plaintiff, a copyholder, in an action on the case against a freeholder of the manor, for over-stocking the common beyond such stint: although it was objected that the instrument was not proved to have been signed by a majority of the then copyholders of the manor, nor that the plaintiff held the copyhold tenement of any one of those who had signed it. *Chapman* v. *Cowlan*, *M.* 51 *G.* 3. 10

2. There is no objection to a bastard, being of years of discretion, giving evidence on an order of bastardy, as to her reputed father; nor to the reputed father being examined, if he chuse to admit the fact, though he be not compellable to answer. *Rex* v. *Inhabitants of St. Mary's Nottingham*, *E.* 10 *G.* 2. 57

3. An examined copy of the act-book in the registry of the prerogative court of *Canterbury*, stating that administration was granted to the defendant of her husband's goods at such a time, is proof of her being such administratrix, in an action against her as such, without giving her notice to produce the letters of administration. *Davis* v. *Williams*, *H.* 51 *G.* 3. 232

EXECUTION.

In following up a writ of execution to its consummation under the stat. of hue and cry 8 *G.* 2. *c.* 16. which the subsequent statute of 19 *G.* 2. *c.* 34. refers to and adopts as the mode of proceeding in case of a penalty recovered by the executor of a revenue officer, killed in the pursuit of smugglers, against the inhabitants of the hundred, (or of a lath in *Kent*,) it is sufficient for the sheriff, to whom the writ had been delivered, to return, even after the expiration of 60 days given him by the act to return the writ, that he had delivered it to the justices of the peace of the hundred, &c. (who are charged with directing the levy on the inhabitants,) and that they had done nothing upon it: and the Court will not thereupon attach the sheriff for not returning the writ; but the next proceeding is against the magistrates to oblige them to do their duty. *Wright and Another* v. *The Inhabitants of the Lath of St. Augustine in the County of Kent*, *E.* 51 *G.* 3. 544

FINE.

1. No action lies by the reversioner and owner of the inheritance to recover the value of the timber, cut by the deceased tenant for life after a fine levied by her, whereby she acquired a base fee, and before the avoidance of such fine and base fee by the entry of the reversioner for that purpose; such entry not revesting the reversioner's old estate *by relation during the continuance of the base fee* thus created, so as to entitle him at law to the timber and other mesne profits taken during that interval. Even supposing that after the statute of limitations had run against the appropriate action, by the reversioner against the tenant for life, for mesne profits, or, for waste, upon the original wrongful

act of cutting down and converting the trees, an action of assumpsit for money had and received for the purchase money of the trees sold, which was in fact paid to the former tenant for life within six years, was maintainable against her representatives after her death. *Hughes* v. *Thomas and Another, Executrixes of Ann Evans, E.* 51 *G.* 3. 474

2. An actual entry is necessary to avoid a fine, (i. e. a fine with proclamations;) and the lessor of the plaintiff bringing his ejectment upon such avoidance must lay his demise subsequent to such entry. *Berrington* v. *Parkhurst, H.* 10 *G.* 2. *B. R.* 489

3. *R. D.* being tenant for 99 years determinable on his life; *remainder to trustees to preserve contingent remainders;* remainder to his first and other sons in tail male; with remainders over; it was questioned at first whether a fine levied by the tenant for years in possession, and his eldest son the first tenant in tail in remainder, was void against the remainder-man over, by reason that the trustees to preserve contingent remainders, in whom it was contended that a present freehold was vested during the life of the tenant for years, were no parties thereto: but it was held afterwards that the trustees had a vested, and not a contingent remainder; and that the present freehold interest was in them, to commence in possession upon the determination of the term of years by forfeiture or other means, during the life of tenant for years; and thereby that such fine was void against the remainder-man. Ibid.

4. Neither is the estate of such remainder-man over discontinued, or his right of entry within five years taken away by another fine levied by the daughters of the first tenant in tail male; who, upon his death, wrongfully entered and were possessed, and thereby disseised the remainder-man over. Ibid. 489

FREIGHT,

See Insurance, 3.

1. The master of a ship having contracted by the bill of lading with the shippers to deliver goods to certain persons or their assigns, *he or they paying freight for the same;* the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading, without the freight having been paid, is evidence of a new contract and promise on the part of such purchaser, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight; and he is liable for the amount in an action of indebitatus assumpsit brought against him by the shipowner. *Cock* v. *Taylor, E.* 51 *G.* 3. 399

2. The usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, *he or they paying freight for the said goods,* is introduced for the benefit of the master only, and not for the benefit of the consignee; and therefore the master is not bound to the consignor to withhold the delivery of the goods unless the consignee or his assigns pay the freight. Nor does it vary the case that the consignor was also the charterer of the ship. *Shephard* v. *De Bernales, E.* 51 *G.* 3. 565

See further *Charter-party,* 2.

HABEAS CORPUS.

The Court, upon affidavit laid before them, suggesting probable cause to believe that a helpless and ignorant foreigner was brought into this country, and exhibited for money, against her consent, by those in whose keeping she was, granted a rule upon her keepers to shew cause

why

why a writ of habeas corpus should not issue to bring her before the Court, and directed an examination to be taken of her in the mean time before the coroner and attorney of the Court, in the presence of proper persons deputed by the persons applying for the writ, and by those against whom it was prayed. *Hottentot Venus's Case*, *M.* 51 *G.* 3. 195

HIGHWAY,

See Nusance, 1.

1. The general highway act 13 *G.* 3. *c.* 78 *f.* 27. & 29., authorizing surveyors of highways to take and carry the refuse stones from quarries for the repair of the highways, *making satisfaction for damage done* to the lands of any person, *by carrying away* the same; and directing that if the surveyors cannot agree with the land owners upon the amount of such satisfaction, *it shall be settled and ascertained by an order of justices*; and providing further, that no plaintiff shall recover for any trespass, &c. if tender of sufficient amends be made before action brought; and that in case no such tender be made, the defendant, by leave of Court, before issue joined, may pay money into court: held that surveyors having broken a new way over the plaintiff's land, in order to carry such materials for repair, in a case where an old but circuitous road existed before; and having, *after* the damage done, and after an action of trespass brought against them, paid money into court by way of amends; the sufficiency of such amends cannot be questioned at nisi prius; the statute having referred the quantum of amends, if not agreed upon, to the decision of justices of the peace. But it seems to be competent to the plaintiff in such action to shew that the making of such new road over his land was maliciously or wantonly done by the surveyors, and not for the necessary or convenient carriage of the materials over the land for the purposes of the act; and in such case he would not be concluded by the amends tendered or paid into court. *Boyfield* v. *Porter and Another*, *H.* 51 *G.* 3. 200

2. A presentment by a magistrate under the stat. 13 *G.* 3. *c.* 78. *f.* 24. of a nusance in a highway, must allege the offence to be done against the form of the statute; and it is not enough to state that the magistrate, *by virtue of the act*, &c. presented, &c. *The King* v. *Winter*, *H.* 51 *G.* 3. 258

HUE AND CRY.

In following up a writ of execution to its consummation under the statute of hue and cry 8 *G.* 2. *c.* 16. which the subsequent statute of the 19 *G.* 2. *c.* 34. refers to and adopts as the mode of proceeding in case of a penalty recovered by the executor of a revenue officer, killed in the pursuit of smugglers, against the inhabitants of the hundred, (or of a lath in *Kent*,) it is sufficient for the sheriff to whom the writ had been delivered to return, even after the expiration of 60 days given him by the act to return the writ, that he had delivered it to the justices of the peace of the hundred, &c. (who are charged with directing the levy on the inhabitants,) and that they had done nothing upon it: and the Court will not thereupon attach the sheriff for not returning the writ, but the next proceeding is against the magistrates to oblige them to do their duty. *Wright and Another* v. *The Inhabitants of the Lath of St. Augustine in the County of Kent*, *E.* 51 *G.* 3. 544

HUSBAND AND WIFE.

1. A wife may sue a supplicavit in Chancery against her husband, to

find

find sureties not to beat or evil intreat her, aliter quam causâ regiminis et castigationis. *Lord Vane's case, H* 17 *G.* 2 172

2. The facts stated in the articles are to be considered as true till the contrary appears upon a proper prosecution. ibid.

3. Where there are articles of separation between the husband and wife, if the husband afterwards confine her, she may have a habeas corpus and be set at liberty. *Listor's case, T.* 8 *G.* 1. 173

INCLOSURE,

See COMMON, 2.

Where an appeal to the sessions was against the sufficiency of an allotment under an inclosure act, and it appeared that the ground was staked out in *March*, when the appellant took possession of and cropped it, though no final award was made of it by the commissioners till long afterwards; yet an appeal lodged at the *October* sessions was held to be out of time; and this, though a small part of the allotment was, with the appellant's consent, exchanged so late as in *July*. *The King* v. *The Justices of Wilts, H.* 51 *G.* 3. 352

IMPRESS.

A carpenter belonging to a vessel employed in the coal and coasting trade is not exempted from being impressed by any statute now in force. *Ex parte Boggin, E.* 51 *G.* 3. 549

INDIA BOND,

See BOND, 1.

INDICTMENT,

See PRESENTMENT.

1. An indictment will not lie for conspiring to commit a civil trespass upon property, by agreeing to go, and by going into a preserve of hares, the property of another, for the purpose of snaring them; though alleged to be done in the night by the defendants, armed with offensive weapons for the purpose of opposing resistance to any endeavours to apprehend or obstruct them. *The King* v. *Turner and Others, H.* 51 *G.* 3. 228

2. Indictment against several, for conspiring together, *by indirect means*, to prevent one *H. B.* from exercising the trade of a taylor, held well. *Rex* v. *Eccles and Others, M.* 24 *G.* 3 *B. R.* 230

3. The Court refused a certiorari to remove an indictment for a misdemeanor, and proceedings thereon at the assizes, after conviction and before judgment, which was prayed for the purpose of applying for a new trial, on the judge's report of the evidence, upon the ground that the verdict was against evidence and the Judge's direction. *The King* v. *The Inhabitants of the County of Oxford, E* 51 *G.* 3. 411

4. Where two conspire, and one dies, the other may still be indicted for the conspiracy. *The King* v. *Nichols, M.* 17 *G.* 2. 413

5. A certiorari will not lie to the sessions to remove a conviction for a misdemeanor before judgment; for the fine being uncertain, the Court above cannot tell how to assess it. Otherwise where the punishment is certain. *The King* v. *Nicholls, M.* 18 *G.* 2. 414

INFANT.

The Court refused, on motion, to discharge an infant plaintiff, who had sued without prochein amy or guardian, and was in execution for the costs. *Finley* v. *Jowle, M.* 51 *G.* 3. 6

INFORMATION.

1. A criminal information may be moved for against magistrates, for misconduct in the execution of their

offices, in the second term after the offence committed, there being no intervening assizes. *The King* v. *T. Harris and Another*, *H.* 51 *G.* 3. 270

2. But the Court will not grant a rule nisi for a criminal information against a magistrate so late in the second term after the imputed offence, as to preclude him from the opportunity of shewing cause against it in the same term. *The King* v. *Marshall and Grantham*, *H.* 51 *G.* 3. 322

INSOLVENT DEBTOR.

1. An insolvent debtor may be brought up after the ordinary time allowed, on affidavit of his ignorance of the creditor's place of abode till recently before his application, within the saving clause of the stat. 33 *G.* 3. *c.* 5. *s.* 5. *The King* v. *Wakefield*, *T.* 50 *G.* 3. 190

2. One convicted upon an indictment for an assault, who, upon reference to the king's coroner and attorney, was directed by his award to pay so much for *costs*, and so much for *compensation* to the prosecutrix, is entitled to be discharged as an insolvent debtor under the lords' act, 32 *G.* 2. *c* 28. without the aid of the stat. 33 *G.* 3. *c.* 5. Ibid.

INSURANCE.

1. After an order made by the king in council on the 2d and gazetted on the 5th of *September* 1807, to detain and bring into port all *Danish* vessels, *a hired armed ship of his majesty* took off *Lisbon*, on the 10th, and carried in thither a *Danish* vessel; and without instituting any proceeding in the admiralty court there, though *Portugal* was an ally with *England* in the war, sold her cargo to defray the expence of repairs, and took in a loading on freight for *London*, with which she sailed on the 3d of *November*, on which day hostilities were declared against *Denmark* by another order of council: and on the 12th of *November* an insurance was made by order of the prize agent appointed by the captors, in consequence of a letter written by him in *October*, before the declaration of hostilities, directing the plaintiff to insure "*for my account* the *Danish* vessel *Knud Jerkelson*, *which has been detained by his majesty's armed ship* Duchess of Bedford, *and for which I am authorized to act as agent*;" and concluding with expressing the agent's confidence that the plaintiff would do the best *for the interest of the concerned*: and after such insurance was effected, the king, by another order of council, reciting the circumstances, adopted the insurance. Held that his majesty, having a lawful possession of the captured vessel through the act of his officers and servants, whose possession was legalized by the previous order to detain *Danish* vessels, whether known to them or not at the time of the capture, had an insurable interest therein; and that it was competent for him to adopt the insurance made by order of the agent appointed by the captors; whose letter of instructions to insure *for his account* was sent in his general character of *agent for the capturing ship*, and permitted by the terms of it an insurance to be effected for the benefit of any who might ultimately appear to be interested; and none other but his majesty having an interest in the vessel seized before the declaration of hostilities and order for reprisals. *Routh* v. *Thompson*, *H.* 51 *G.* 3. 274

2. An *American*, properly licensed to export saltpetre from *Calcutta* to *America*, having insured it for the voyage, the ship was seized by the captain of a *British* ship of war at the *Cape of Good Hope*, and the cargo condemned, unshipped, and sold by

by order of the Court of Admiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captor's costs. Held, that the assured might recover as for a total loss, without notice of abandonment; the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the *Cape* under the order of the Court there: and that such loss was recoverable against the underwriters, on a count alleging it to have happened by the *unlawful seizure and detention of a* British ship of war: however questionable it might have been, if notice of abandonment had been necessary, whether such a notice, not given till after the receipt of a second letter from the *Cape*, announcing the condemnation, landing, and sale of the goods, were in time; when a prior letter of advice had stated the seizure and detention, on which no notice had been given. And held, that the Court of Appeal allowing the captor his costs, on the reversal of the sentence of condemnation, did not the less shew the original seizure and detention to be *unlawful*, as alleged in the count. *Mullett and Another* v. *Shedden, H.* 51 *G.* 3. 304

3. The valuation upon a freight policy of insurance is calculated upon all the goods the ship is intended to carry upon the voyage insured; and if by a peril insured against the ship be lost, when part only of the goods, the freight of which was intended to be covered, was on board, the valuation must be opened, and the assured can only recover as for that proportional share. As where freight, valued at 6500*l.* was insured on a ship from any port or ports in *Hayti* to *Liverpool*; and the ship, which had sailed with goods from *Liverpool* to *Hayti* on a voyage of barter, after exchanging a part of her outward cargo for 55 bales of cotton at one port of *Hayti*, proceeded with the same to another port, for the purpose of making a similar barter of the rest of the outward cargo, but was lost by a peril of the sea before it was effected; the assured was only entitled to recover for the freight of the 55 bales of the return cargo on board; though there was a moral certainty at the time, that the remaining part of her outward cargo would, except for the loss, have been exchanged for a full return cargo; for shortly after the loss of the ship, the goods saved from the wreck were in fact exchanged for more produce than was sufficient to have covered the freight insured.

But if there be a loss by a peril insured against, of the *whole* subject-matter of the insurance to which the valuation applied, as of *all* the *intended* freight, where the insurance is on freight, the valuation in the policy will not be opened.

And in an action on a freight policy, it seems sufficient to prove a contract under which the ship-owner would have been entitled to demand freight if the voyage were not stopped by a peril insured against. *Forbes* v. *Aspinall, H.* 51 *G.* 3. 323

4. A native *Spaniard*, domiciled here in time of war between this country and *Spain*, having been licensed in general terms by the king to ship goods in a neutral vessel from hence to certain ports of *Spain*, such commerce is legalized for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his correspondents, though residing in the enemy's country; and such goods may, therefore, be insured by him, either on his own account, or as agent for them; and he may sue and recover upon the policy in his own name in case

case of a loss by capture: and this, though the prize, which was taken by a *French* privateer, (*France* being a co-belligerent with *Spain* in the war, and both governments having issued similar decrees against *British* commerce,) was afterwards condemned by a *French* consular court then sitting in a port of *Spain*, into which the prize was carried: for in respect of the purposes of such licensed trading, the subjects of *Spain* concerned in it are to be regarded as *British* subjects. *Usparicha* v. *Noble*, *H.* 51 *G.* 3. 332

5. *British* goods on board a neutral ship, being insured from *London* to any ports or places of discharge on the continent, &c. with liberty to carry simulated papers, &c. *free of capture or seizure in her port or ports of discharge*; and the ship having received instructions to proceed to the river *Jahde* with a supercargo, who, when arrived there, was to go to *Varel*, which lies 30 miles up the river, and there give notice to a correspondent of the ship's arrival, and receive directions where the goods might most safely be landed; *Varel* and the whole adjacent country being then occupied by the enemy: held, that a seizure by the enemy in boats from the shore, while the ship was lying on and off in the middle of the river, 15 miles up, where it is two miles wide, waiting for directions from the supercargo, who had gone up to *Varel* to get instructions where to land the cargo, was a seizure *in a port of discharge* within the exemption in the policy: for the intention of the contracting parties was plainly to exempt the underwriters from *land* risks in any such *port of discharge*, leaving them subject only to *sea* risks; and therefore the word *port* must be taken in its general and most extensive sense, as contradistinguished from the *high seas*, with reference to the subject-matter; though the place where the seizure was made was not ordinarily denominated *a port*, nor were goods used to be landed there in the accustomed course of commerce. *Jarman* v. *Coape*, *E.* 51 *G.* 3. 394

INTEREST.

Where goods are sold and delivered upon an agreement by the vendee to pay for them by a bill at a certain date; as interest would have run upon such bill, if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods upon the common count for goods sold and delivered. *Marshall and Another* v. *Poole and Another*, *M.* 51 *G.* 3. 98

The same point was decided in this term in *Boyer* v. *Warburton*. 98

JOINT AND SEVERAL REMEDY,

See Account, 2.

JURISDICTION,

See Appeal. London Court of Requests.

Though the cause of action accrued within the jurisdiction of the Supreme Court at *Calcutta*, while both the parties were resident there; and by the king's charter, granted in pursuance of the stat. 13 *G.* 3. *c.* 63. that Court is authorized to exercise the same jurisdiction in civil cases as is exercised by the Court of K. B. within *England by the common law thereof*; and assuming that by such authority the provisions of the statute of limitations 21 *Jac.* 1. *c.* 16. *s.* 7. and 4 *Ann.* *c.* 16. *s.* 19. are transferred to *India*, as part of the law of *England*, auxiliary to the common law; yet by the express terms of the savings in those sta-

tutes, as applicable to the courts here, the plaintiff's right of action upon an assumpsit is saved, if he (having returned home before the defendant) commence such action within six years after the defendant's return home, though more than six years had elapsed in *India* after the cause of action accrued there, and during the defendant's stay within the jurisdiction of the Court in that country. *Williams* v. *Jones*, *E.* 51 *G.* 3. 439

JUSTICES OF THE PEACE,

See INFORMATION, 1.

LADING, BILLS OF,

See BILLS OF LADING.

LANDLORD AND TENANT,

See LEASE, 3. STAMP, 4.

One who is put in possession upon an agreement for the purchase of land, cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise. And even considering such lawful possession as a tenancy at will, the defendant's confession, (by entering into the common rule,) of a lease by the lessor to the nominal plaintiff, is not a constructive determination of the will whereon to maintain the ejectment. *Right d. Lewis* v. *Beard*, *H.* 51 *G.* 3. 210

LEASE.

See STAMP, 4.

1. An instrument, executed on the 24th *November* 1807, upon an agreement stamp, setting forth the conditions of letting a farm, and the regulations to be observed by the tenant; that the term was to be from year to year, the lands to be entered upon the 3d of *February* 1808, and the housing on the 12th *May*; and that *a lease was to be made upon these conditions, with all usual covenants*; at the foot of which the defendant wrote, "*I agree to* "*take lot* 1., (the premises in "question,) *at the rent, &c. subject* "*to the covenants*," is an *agreement for a lease*, and not *a present demise*; there being not only a stipulation for a future lease, but time given to prepare it before the commencement of the term, and no present occupation as a tenant contracted for. But after the defendant had been let into possession under such agreement, and had paid rent under it; held, that that was sufficient to satisfy a count against him, as tenant upon a *demise*, for mismanagement of the farm, contrary to the terms of such agreement; such count stating, that whereas the plaintiff *had demised*, &c. And held, that it was not necessary to state the whole of the agreement, if the part omitted did not qualify that which was stated. *Tempest* v. *Rawling*, *M.* 51 *G.* 3. 18

2. A covenant in an indenture of lease for 21 years from *Michaelmas*, that the tenant should not, during the term, cut down any of the coppice *of less than* 10 *years' growth*, or at any unseasonable time of the year: *but at the end of the term the landlord agreed to pay to the tenant the value of all such growth of coppice as should be then standing and growing*; was held, according to its *grammatical* construction, (uncontrolled by any other part of the instrument showing a different intent,) to bind the landlord, to whom the words of the covenant were to be attributed, to pay the tenant for the value of all the coppice of *less than* 10 *years' growth*, left standing on the demised premises at the end of the term; though no special consideration appeared on the face of the deed for the landlord's agreeing to make a compensation to the tenant for the value of such part of the coppice

which

which the tenant was not entitled to cut. One Judge, who dissented, thought that the words "*such* growth" referred to a growth of 10 years, though inaccurately expressed founded on a strong presumption of the meaning of the parties, as gathered from the restriction on the tenant not to cut coppice of less than 10 years' growth, and to the period of the year when the tenancy would end; which was before the cutting season, but after a portion of the coppice would be of 10 years' growth. *Love* v. *Pares*, *M.* 51 *G.* 3. 80

3. Where a power of leasing was given to the father, tenant for life, and *after his decease*, to the son, tenant for life; and the son obtained a grant from the father of his life estate (without noticing the power), subject to a certain rent, with a power of re-entry for non-payment, &c.: held, that the son, during the lifetime of his father, could not lease under the power. *Elizabeth Ann Coxe, an Infant, by John Gordon, her next Friend*, v. *Day*, *M.* 51 *G.* 3. 118

4. Under a leasing power, with a condition (inter alia) for re-entry for non-payment of rent for 21 days, a lease granted with a condition for re-entry for non-payment of rent in 20 days, *in case no sufficient distress can be taken on the premises whereby to levy the rent*, *&c.* is not a good execution of the leasing power; such conditional power of re-entry being less beneficial to the remainder-man than an absolute power of re-entry on non payment of rent. Ibid. 118

LECTURER,

See Mandamus, 1, 2.

LIBEL.

1. An action for a libel, charging in one count, that the defendant published it as purporting to be a letter from *A.* to *B.*; and in another charging, generally, that the defendant published the libellous matter; is not sustained by proof of a publication wherein the defendant stated, that in a debate in the *Irish* House of Commons several years before, the Attorney-General of *Ireland* had read such a letter, and then stating the libellous matter *as said by him* in commenting upon that letter; for the characters of the several libels are essentially different, though the slander imputed may be the same. *Bell* v. *Byrne*, *E.* 51 *G.* 3. 554

2. It seems, also, that a libellous assertion, that the plaintiff "*has been for some time past* confined on a charge of high treason," taken as a fact asserted generally by the publisher on his own knowledge, would refer to the period of the publication, and therefore would not be proved by shewing that it was asserted to have been said by another some years before, and consequently referring to the period when it was so said. ibid.

3. Proof of a warrant to arrest *on suspicion of high treason* will not sustain a justification that the plaintiff was arrested and confined *on a charge of high treason*. Ib. 554

LICENCE,

See Mandamus, 1, 2.

LIMITATIONS, STATUTE OF,

See Assumpsit, 8. East Indies, 2.

LONDON COURT OF REQUESTS.

After an action brought in *B. R.* for board *and lodging* of the defendant's wife *in Middlesex*, which was *referred* to an arbitrator, who awarded less than 5*l.*, which was for *the rent* of the lodging: this was held at any rate to come within the 13th section

section of the stat. 39 & 40 *G.* 3. *c.* 104. excepting actions for rent from the compulsory jurisdiction of the *London* court of requests; although the defendant were otherwise within the act: but without deciding whether the clerk of a solicitor, attending at his master's office within the city during the hours of business throughout the whole day, but lodging *in Middlesex*, shall be said to *seek a livelihood in London*, within the meaning of the act. *Holden* v. *Newman*, *M.* 51 *G.*3. 161

LONDON INSTITUTION.

A share in the *London* Institution, incorporated by charter for the advancement of literature, &c. cannot be transferred until the proprietor shall, *by writing under his hand*, signify his desire so to do to the committee of managers, and mention therein *the name*, &c. and other description of the person to whom he is desirous the same should be transferred, which person is to be approved by the committee: held, that a note addressed to them in these words; " Having disposed of my share in the *London* Institution to [leaving a *blank* for the *name*], I beg leave to recommend him to be elected in my place, as a proprietor," &c. and signed by the proprietor; which note was left in the hands of an agent, (the clerk of the society,) for the purpose of selling the share; did not authorize such agent to fill up the blank himself with the name of the purchaser with whom he contracted for the price, against the rules of the society, which require the recommendation of the candidate to be vouched by the proprietor himself inserting his name, &c. in the paper; and consequently the agent had no authority, before the transfer was so completed, to receive the money of the purchaser, and to insert his name in the blank, unknown to the proprietor. And such purchaser paying the money before the time of payment when the transfer from the proprietor was complete, pays it at his own risk to the agent, whom he thereby makes his own for that purpose. And such agent afterwards absconding with the money, and the society disallowing the transfer upon the interference of the proprietor; held, that the purchaser could not recover the amount from such proprietor in an action for money had and received. *Parnther* v. *Gaitskell*, *E.* 51 *G.* 3. 432

LUNATIC,

See BAIL, 5. 7.

MAGISTRATES,

See INFORMATION, 1.

MANDAMUS.

1. The act of uniformity, 13 and 14 *Car.* 2. *c.* 4. *s.* 19. having enacted that no person shall be allowed to preach as a lecturer, in any church, &c. " unless he be first " approved and thereunto licensed " *by the archbishop of the province,* " *or bishop of the diocese*," &c. the Court will not entertain a motion for a mandamus to the bishop to license a lecturer appointed by the parish upon the previous refusal of the bishop to do so, upon the alleged ground of unfitness in the party elected, unless it be shewn that the like application had also been made to the archbishop and rejected by him. *The King* v. *The Bishop of London*, *E.* 51 *G.* 3. 419

2. The act of uniformity, 13 and 14 *Car.* 2. *c.* 4. *s.* 19., *having made a licence necessary to enable a lecturer to preach*, and *given authority to the bishop, &c. to grant it*; if a person appear to have a right to it, this Court will compel the bishop, &c. to

to grant such licence, or to shew good reason to the contrary. But it is a good reason against an application for such a licence to shew that the lectureship was appointed *within time of memory*, and *supported by voluntary contributions, without any lay fee or temporal right in the party applying;* and *that he had not the consent of the rector;* though chosen by the parishioners to be lecturer. *The King* v. *The Bishop of London, E.* 16 G. 2. 420

MARRIAGE REGISTER.

A marriage register describing a person to be *of the parish* of *A.* is no evidence upon a question of settlement on appeal against an order of removal, that the party was settled in *A.* *Rex* v. *Inhabitants of Harberton, H.* 51 G. 3. 311

MASTER AND SERVANT.

A vessel hired by the Lords Commissioners of the Admiralty, and employed to cruize against smugglers, the master and crew of which were appointed by the owner, but which was placed under the superior command of a captain appointed by the board, is forfeitable for an act of smuggling committed on board by such Admiralty captain, as well as by the owner's master and crew; and the owner has his remedy over by action on the case against such Admiralty captain to recover damages for the loss of his ship by the condemnation, though that proceeded upon acts of smuggling stated to be by persons unknown; and though it appeared in fact that the master and mate appointed by the owner were also concerned in acts of smuggling on board. *Blewitt* v. *Hill, M.* 51 G. 3. 13

MESNE PROFITS,

See Fine, 1, Pleading, 5.

MISDEMEANOR,

See Indictment, 1, 2. 4.

MILITIA.

A substitute in the militia fraudulently and falsely declaring at the time of his enrolment, that he had no wife or family, when in fact he had a wife and one child, is not entitled to any parochial allowance for their relief, under the stat. 43 G. 3. c. 47. s. 2. & 5. *The King* v. *The Inhabitants of Preston, H.* 51 G. 3. 313

NEW TRIAL.

The Court refused a certiorari to remove an indictment for a misdemeanor, and proceedings thereon at the assizes, after conviction and before judgment, which was prayed for the purpose of applying for a new trial on the judge's report of the evidence, upon the ground that the verdict was against evidence and the judge's direction. *The King* v. *The Inhabitants of the County of Oxford, E.* 51 G. 3. 411

NONSUIT, JUDGMENT OF,

See Variance, 5.

NUSANCE.

If the Court be satisfied that a nusance indicted is already effectually abated before judgment is prayed upon the indictment, they will not, in their discretion, give judgment to abate it. And they refused to give such judgment upon an indictment for an obstruction in a public highway; which highway, after the conviction of the defendant, was regularly turned by an order of magistrates, and a certificate obtained that the new way was fit for the passage of the public, and on affidavits that so much of the old way indicted as was still retained was freed from all obstructions. *The*

The King v. *Incledon*, *M.* 51 *G.* 3. 164

OFFICER,

See Custom-House Officer. Parish Officer.

ORDER OF SESSIONS,

See Bastardy. Sessions.

OVERSEER OF THE POOR,

See Parish Officer, 2.

PARISH OFFICER.

1. One who is de facto guardian of the poor of a parish united with other parishes, under the stat. 22 G. 3. c. 83. for the better relief and employment of the poor, and who is received and acknowledged by the parish as guardian, though not legally appointed such under the statute, is yet competent to apply in that character to a justice of the peace to take the examination of a single woman with child, in order to filiate the bastard, which, by the stat. 6 *G.* 2. *c.* 31. *f.* 1., is directed to be made *upon application by the overseers of the poor*, in whose place such guardian is appointed: and he is also competent to apply to the justice for a summons against a reputed father for not obeying an order of bastardy; which, by stat. 49 *G.* 3. *c.* 68. *f.* 3. is directed to be made *upon complaint by any one of the overseers of the poor*. *The King* v. *Martyr and Fulham*, *M.* 51 *G.* 3. 55

See further *Warrant*, No. 1.

2. The stat. 43 *Eliz.* *c.* 2. *f.* 1. enacting that the *churchwardens* of every parish, *and* 4, 3, or 2 substantial *householders* there, to be nominated by the magistrates, shall be *overseers of the poor*, requires an appointment to be made of *two* such *overseers* at the least, *exclusive* of the existing *churchwardens*; which body so constituted, or the greater part of them, are empowered to execute certain duties relating to the poor: and therefore the 5th section which authorizes "*the said churchwardens and overseers, or the greater part of them*," (by the assent of two justices,) to bind out poor children apprentices, is not satisfied by a compulsory binding by *two* persons styling themselves *churchwardens and overseers*, who had been appointed the overseers of the parish at a time when *one* of them was *churchwarden*; which latter continued the sole churchwarden for about two months afterwards, when the other overseer was appointed sole churchwarden in his place. For at all events this power is given to a body constituted of more than two persons; though it may be executed by the major part of the body when well constituted. And therefore a poor child, assumed to be bound apprentice by such an indenture, could not gain a settlement by service under it. *The King* v *The Inhabitants of All Saints*, *Derby*, *M.* 51 *G.* 3. 143

PARTICULARS OF THE PLAINTIFF'S DEMAND.

See Practice, 21.

PARTNERS.

1. The defendant agreed in writing to take one-half share of certain goods bought by the plaintiff on their joint account; half in the profit or loss, and to furnish the plaintiff with half the amount in time for the payment thereof; and the goods being to be paid for by bills: held, 1st, that this was an agreement *relating to the sale of goods*, within the exemption in the stamp act 44 *G.* 3. *c.* 98., sched. A, and did not require a stamp. *Venning* v. *Leckie*, *M.* 51 *G.* 3. 7

2. 2dly, That the plaintiff having paid the whole price of the goods which were to constitute the partnership stock,

ſtock, to which both parties were to contribute equally; an action lay againſt the defendant for his moiety of the price which was to be furniſhed by him in the firſt inſtance; although there might be an account to be taken between them as partners upon the ſubſequent diſpoſal of the joint ſtock. ibid.

3. If one partner draw or indorſe a bill in the partnerſhip firm, it will primâ facie bind the firm; although paſſed by the one partner to a ſeparate creditor in diſcharge of his own debt; unleſs there be evidence of covin between ſuch ſeparate debtor and creditor, or at leaſt of the want of authority, either expreſs or to be implied, in the debtor partner to give the joint ſecurity of the firm for his ſeparate debt. But held that no ſufficient circumſtance appeared to raiſe any preſumption adverſe to the ſeparate creditor taking ſuch joint ſecurity in a caſe where the bill appeared to have been drawn in the name of the firm to their own order 18 days before the delivery of it to the ſeparate creditor, and to have been accepted and indorſed before ſuch delivery, and to have been drawn for a larger amount than the particular debt; and where, though the indorſement were in fact made by the hand of the debtor partner, yet it did not appear that that fact was known to the ſeparate creditor at the time; and this too in a caſe where direct evidence might have been given of the covin or want of authority, if it exiſted. For the action being brought by the ſeparate creditor againſt the acceptor, either of the partners might have been called as a witneſs by the defendant to diſprove the authority of the debtor partner to give the joint ſecurity: for though if the ſeparate creditor recovered againſt the acceptor, he would have his remedy over againſt the firm; yet the innocent partner would have his remedy over againſt the other. And the bankruptcy of the debtor partner in the mean time does not vary the queſtion of competency. *Ridley and Another* v. *Taylor*, *M.* 51 *G.* 3. 175

4. Part-owners of a ſhip having agreed "Each and every of them with the others, and each or every of the others," that the ſhip ſhould proceed on a certain voyage *under the excluſive management and control of one of them as ſhip's huſband*; and that after her return "*a full account ſhould be made of the ſaid ſhip and her concerns*," and the *neat profits* be divided in proportion *after deducting all charges*; the duty of making out ſuch an account is caſt upon the ſhip's huſband; and for not doing ſo, and not dividing the neat profits, after deducting all charges, within a reaſonable time after the ſhip's return, an action lies againſt him upon the agreement by each of the part-owners; though it be not averred in terms that the charges were or could have been aſcertained before the action brought; for that is matter of defence. *Owſton* v. *Ogle*, *E.* 51 *G.* 3. 538

PAYMENT OF MONEY INTO COURT,

See HIGHWAY, 1. PRACTICE, 22.

PENAL SUM.

In aſſumpſit upon a memorandum for a charter-party, deſcribing the agreement of the defendant, the ſhip-owner, to proceed with all convenient ſpeed to a foreign port, and there load, within 20 running days, a cargo from the plaintiff's factors, and therewith return home, and in 15 running days deliver the ſame, on payment of certain freight; concluding with a certain *penalty for non-performance*: held that the plaintiff might recover damages on the breach of the contract, in the defendant's

fendant's not permitting the vessel to proceed on the voyage, beyond the amount of the penalty. *Harrison* v. *Wright*, *H.* 51 *G.* 3. 343

PLEADING,

See Covenant. Libel. Practice, 13. Variance, 5.

1. In debt on bond, conditioned not to assault, molest, or injure the person of the plaintiff; the replication, alleging that the defendant assaulted, molested, and injured the person of the plaintiff *by* then and there beating, &c and otherwise ill-treating him, is sustained by evidence that the defendant, who was sitting in the same room, jumped up from his seat with his fist clenched as if to strike the plaintiff, but was pulled back to his seat by another before he was within reach of the plaintiff. *Tombs* v. *Painter*, *M.* 51 *G.* 3. 1

2. And this was a sufficient assignment, by the replication, of a breach of the condition, for which the jury were to assess damages on the stat. 8 & 9 *W.* 3. *c.* 11. *s.* 8., although such breach were not alleged in formal terms to be laid *according to the statute.* ibid.

3. It is not necessary, in declaring upon an agreement, to set forth the whole of it, if the part omitted do not qualify that which is stated. *Tempest* v. *Rawling*, *M.* 51 *G.* 3. 18

4. A count in an action on the case, stated that whereas heretofore, &c. the plaintiffs had agreed to purchase, and the defendants to sell and deliver to them, *at a certain rate or price per pound, to be paid in a manner then stipulated between them*, 40 bags of wool, *to be delivered* by the defendants to the plaintiffs, *at a time which, before the making of the promise of the defendants after mentioned had elapsed*, but which wool had not then been delivered; and therefore, *in consideration of the premises, and also in consideration* that the plaintiffs would still receive and pay for the said wool *at the rate or price and in manner last aforesaid*, on the delivery of it within a reasonable time; the defendants promised the plaintiffs to deliver the said wool accordingly within such reasonable time as aforesaid; and then alleged that though the plaintiffs, for a reasonable time after the defendant's promise, were ready and willing to receive and pay for the wool, *at the rate and price and in manner last aforesaid*; yet the defendants would not deliver, &c.: held that this was too general, and bad upon special demurrer; inasmuch as *no price and manner of payment* were mentioned, which were referred to in, and incorporated with, and made part of the consideration of, the new promise declared on; and without such price being stated, no measure was given to the jury for estimating the damage to the plaintiffs by the non-delivery of the goods. *Andrews and Others* v. *Whitehead and Another*, *M.* 51 *G.* 3. 102

5. The defects of a declaration in an action for mesne profits, in not stating *any time* when the defendant broke and entered the messuage, &c. and ejected the plaintiff from the occupation of it; and in stating only that the defendant kept and continued the plaintiff so ejected *for a long space of time*, without stating for *how long*; are cured by the operation of the stat. 4 *Ann. c.* 16. after judgment by default and writ of inquiry of damages executed; so that no objection can be taken in arrest of final judgment for such defect in form. *Higgins* v. *Highfield*, *E.* 51 *G.* 3. 407

6. A contract for the purchase of a certain parcel of hemp, the exact amount of which, not being known at the time, was described in the contract as *about* eight tons, may be declared

declared on as a contract *for eight tons*, the certain quantity which it was afterwards proved to be; which quantity was laid under a videlicet. *Gladstone* v. *Neele*, *E*. 51 *G*. 3. 410

7. In a count against the acceptor of a bill of exchange, stated to be *accepted payable at* S. *and Co.'s*, it is sufficient to allege *generally* a request by the plaintiff to the defendant to pay the bill, without alleging that it was presented for payment *at the particular place*. *Fenton* v. *Goundry*, *E*. 51 *G*. 3. 459

8. And no objection can be taken on demurrer, not assigning at least the cause specially, that after stating the day on which the bill was drawn, which was made payable at a *future* day, the count alleged that *afterwards*, to wit, *on the same day*, &c. the demand of payment was made. Ib.

9. A defendant has the same time to plead after the delivery of a bill of particulars as he had when the summons for it was returnable. *Mowbray* v. *Schuberth*, *E*. 51 *G*. 3. 508

POOR,

See Parish Officer.

POOR's RATE.

An act of the 48th *Geo*. 3. having vested the aftermath of a certain meadow in trustees, in trust for the burgesses and principal householders of *Tewkesbury*, freed from all other interest in the same; with power to let the same, or any part or parts thereof, to any person or persons for the best rent, *and also to let it* in pastures, for horses, cattle, and sheep, to different persons, at such rates, and subject to such regulations, as the trustees should appoint; or by writing under their hands and seals to demise the same for a term of years, &c.; and that the rents and profits should, after payment of all charges, be divided by the trustees amongst the objects of the trust: held that the trustees, not having let the aftermath to any persons for any certain term or in any certain proportions. but having let it out (as it was called) *in pastures*, at so much a head for horses, cattle, and sheep, to various persons, must themselves be taken to be the occupiers of the land; and were, consequently, rateable for the same *The King* v. *The Trustees for the Burgesses*, &c. *of Tewkesbury*, *M*. 51 *G*. 3. 155

POOR-REMOVAL.

Where husband and wife and their children were removed by an order of justices to the place of their last settlement, and that order was suspended as to the husband, until it should be made appear that he was sufficiently recovered to be able to travel; the wife and children being removed after his death, without any subsequent order removing the suspension of the first order, is no reason for the Sessions to quash the order on appeal, nor to quash another order for payment of the charges of such suspension. *The King* v. *The Inhabitants of Englefield*, *H*. 51 *G*. 3. 317

PORT OF DISCHARGE,

See Insurance, 5.

POWER.

1. Where a power of leasing was given to the father, tenant for life, and *after his decease*, to the son, tenant for life, and the son obtained a grant from the father of his life estate (without noticing the power,) subject to a certain rent, with a power of re-entry for non-payment, &c.: held that the son, during the lifetime of his father, could not lease under the power. *Elizabeth Ann Coxe*, *an Infant*, *by John Gordon*, *her next Friend*, v. *Day*, *M*. 51 *G*. 3. 118

2. Under

2. Under a leasing power, with a condition (inter alia) for re-entry for non-payment of rent in 21 days, a lease granted with a condition of re-entry for non-payment of rent in 20 days, *in case no sufficient distress can be taken on the premises whereby to levy the rent*, &c. is not a good execution of the leasing power; such conditional power of re-entry being less beneficial to the remainder-man than an absolute power of re-entry on non-payment of rent. ibid.

PRACTICE,

See Bail. Bastardy, Order of, 6.

1. Under the stat. 5 *W.* & *M.* *c.* 11. *s.* 2. & 3. requiring a defendant, removing an indictment from the sessions by certiorari, to find two sufficient manucaptors, who shall enter into a recognizance in 20*l.* conditioned to appear, plead, and try, &c. and that if the defendant be convicted, &c. the Court shall give reasonable costs to be taxed, &c.; *and that the said recognizance shall not be discharged till the costs so taxed shall be paid*; the amount of the costs to be taxed is not limited by such recognizance, which is only a further security for them; and the Court will not discharge the recognizance till the taxed costs are paid to the prosecutor. *The King* v. *Teal and Others*, *M.* 51 *G.* 3. 4

2. The practice is to take the recognizance in 20*l.* from each of the manucaptors. ibid.

3. The statute giving the prosecutor an attachment for recovery of his taxed costs within 10 *days* after demand and refusal, means 10 entire days. ibid.

4. The Court refused, on motion, to discharge an infant plaintiff, who had sued without prochein amy or guardian, and was in execution for the costs. *Finley* v. *Jowle*, *M.* 51 *G.* 3. 6

5. The rule for judgment must have four clear days, exclusive of the first and last, and of *Sunday*, before judgment entered. *Roberts* v. *Stacy*, *M.* 51 *G.* 3. 21

6. Where the same plaintiff brought three actions of trespass against three several defendants, for different parts which they took in the same transaction; one against the Speaker of the House of Commons, who justified under a warrant issued by him, under the order of the House, for arresting and committing to the Tower the plaintiff, a member of the House, for a breach of privilege in publishing a libel upon the House; to which justificatory plea the plaintiff demurred: another against the Serjeant at Arms; who pleaded not guilty, and also justified under the authority of the Speaker's warrant; to which the plaintiff replied an excess in the manner of executing the warrant, by a military force, and with improper and unnecessary violence; on which issue was joined to the country: and the third against the Constable of the Tower, who received and detained the plaintiff as a prisoner; and who also justified under a warrant from the Speaker for that purpose; in which issue was also taken to the country on several facts stated in such justification: and notice of trial was given by the plaintiff in the two last causes, (which stood for trial at bar on a day fixed;) but the plaintiff, though still within time by the general rules and practice of the Court, had not set down his demurrer in the first cause for argument: the Court, on motion of the Attorney-General on behalf of the Serjeant at Arms, and of the Constable of the Tower, postponed the trial of the issues in those causes until after the argument on the demurrer in the cause against the Speaker; because the right, just, and distinct consideration of the questions

questions which arose on the issues of fact, and on the true measure of damages, in the causes against the Serjeant at Arms and the Constable of the Tower, depended mainly upon the decision of the issue in law joined in the other action against the Speaker: and though the same question of law might ultimately be raised on motion in the two former actions; yet it could not be considered so conveniently to the Court, to whom the decision of such question belonged, or so advantageously to the party who should prove to be in the right, as upon the demurrer, which presented the question of law distinct from the questions of fact. *Sir Francis Burdett, Bart.* v. *Colman. The Same* v. *The Earl of Moira, M.* 51 *G.* 3. 27

7. Where the plaintiff, after arresting and holding the defendant to special bail for 50*l.* took 20*l.* out of court which the defendant had paid in, and stayed further proceedings: held that that did not warrant an application for costs on the part of the defendant, by the stat. 43 *G.* 3. *c.* 46. *s.* 3. against frivolous and vexatious arrests, which authorizes costs to be awarded to the defendant if the plaintiff do not *recover* the sum for which he held the defendant to bail, and had *no reasonable or probable cause* for holding him to bail to that amount. *Rouveroy* v. *Alison, M.* 51 *G.* 3. 90

8. The Court will take no cognizance of a special case reserved upon the the trial of an indictment at the sessions. *The King* v. *The Inhabitants of the County of Salop, M.* 51 *G.* 3. 95

9. The rule of Court of *H.* 26 *G.* 3. superseding a prisoner, against whom the plaintiff shall not proceed to *trial or final judgment* within three terms after declaration delivered, does not attach in a case where there are two defendants, one of whom suffered judgment by default, and the other pleaded to issue; the trial of such issue being had within the third term; though the costs were not taxed, nor final judgment in fact signed till after the term, but then entered, according to the course of the Court, as of that term. *Wrigglesworth and Another* v. *Wright and Stacey, M.* 51 *G.* 3. 167

10. If defendant put in special bail within four days in a town cause, he is entitled to plead in abatement, provided such bail be afterwards perfected in time; though he had before put in other bail and given notice of justifying, but had withdrawn them in time. *Hopkinson* v. *Henry and Another, M.* 51 *G.* 3. 170

11. Where a nonsuit is set aside upon payment of costs, such payment is made a condition precedent to the setting aside the nonsuit; and without it, the plaintiff cannot proceed to another trial. *Nichols* v. *Bozon, M.* 51 *G.* 3. 185

12. Affidavits not intitled *in the King's Bench*, and sworn before *A. B., a commissioner, &c.*; without stating him to be a commissioner of this court; cannot be read; but those sworn *in court*, or *before a judge of the Court*, though not entitled *in the King's Bench*, may be read. *The King* v. *Hare, T.* 50 *G.* 3. 189

13. In an action on a bond given 12 years ago in the *East Indies*, where the subscribing witness resided, the defendant having first caused great delay to the action by insisting on oyer of the original instead of a sworn copy; which obliged the plaintiff to send for the bond from the *East Indies*; and having then, by leave of the Court under the statute to plead several matters, pleaded non est factum, solvit ad diem, and solvit post diem; the Court, in consideration of the delay which had already intervened, and of the further delay which might be

be occasioned by taking the deposition of the subscribing witness in the *East Indies* in proof of the bond; and also upon an affidavit that part payments had been made on the bond by the defendant since his return home, and recently before the action brought, rescinded the rule for pleading double, in order to make the defendant elect to stand either upon his plea of non est factum, or on his pleas of payment at and after the day. *Rama Chitty* v. *Hume*, *H.* 51 *G* 3. 255

14. A criminal information may be moved for against magistrates for misconduct in the execution of their offices in the second term after the offence committed, there being no intervening assizes. *The King* v. *T. Harries and Another*, *H.* 51 *G.* 3. 270
Vide post, pl. 16.

15. The defendant having been sued and held to bail by a wrong christian name; but the plaintiff having declared against him, and bail having been put in and perfected for him by his right name; the bail cannot afterwards object to the irregularity upon a motion to enter an exoneretur upon the bail piece. *Clark* v. *Baker*, *H.* 51 *G* 3. 273

16. The Court will not grant a rule nisi for a criminal information against a magistrate so late in the second term after the imputed offence as to preclude him from the opportunity of shewing cause against it in the same term. *The King* v. *Marshall and Grantham*, *H.* 51 *G.* 3. 322

17. Time refused to be enlarged for the bail to render their principal, on an affidavit that he was a lunatic; it not appearing that he was in such a state as to occasion any immediate peril of life, either to himself or to those about him. *Cock* v. *Bell*, *H.* 51 *G.* 3. 355

18. Where the proceedings are by original, the plaintiff in error cannot be ruled to appear before the quarto die post of the return day of the alias writ of scire facias quare executionem non, &c. where nihil had been returned. *Sharp* v. *Clark*, *in Error*, *H.* 51 *G.* 3. 391

19. A notice of trial for the sittings after term in *London* must specify whether the cause is intended to be tried at the first day of such sittings, or at the adjournment-day: and in the latter case, it is sufficient to give such notice eight days before the first day of the sittings after term, if the defendant reside above 40 miles from *London*; and four days if he reside within that distance. *Regula Generalis*, *E.* 51 *G* 3. 393

20. The defendant being in custody of a messenger under an order of the Secretary of State, for the purpose of being sent out of the kingdom by virtue of the alien act 43 *G.* 3. *c.* 155., the Court refused to issue a habeas corpus on the application of his bail to bring him up that they might render him in their own discharge, on account of the public inconvenience and probable risk of his passage, which had been taken in a ship immediately about to sail to his destined port: and they also refused, while he was still in the kingdom, and might possibly be set at large again, to enter an exoneretur on the bail-piece. But they said they would remember that the situation of the bail was without any fault of theirs, if any proceedings were taken against them in the mean time. *Folkein* v. *Critico*, *E.* 50 *G.* 3. 457

21. A defendant has the same time to plead after a delivery of a bill of particulars as he had when the summons for it was returnable. *Mowbray* v. *Schuberth*, *E.* 51 *G.* 3. 508

22. Rule refused to permit the defendant to pay into court the debt and costs up to a certain day after the action brought, (thereby excluding the costs of the declaration delivered,) upon the ground of an offer to pay the debt and costs up to that period,

it as a contract for an equal proportion of sorts; whereas it was to depend upon the contents of the cargo which might first arrive. *Lee* v. *Walker*, *M.* 50 *G.* 3. *cited.* 113

3. A contract for the purchase of a certain parcel of hemp, the exact amount of which, not being known at the time, was described in the contract as *about* 8 tons, may be declared on as a contract *for* 8 *tons*, the certain quantity which it was afterwards proved to be, which quantity was laid under a videlicet. *Gladstone* v. *Neale*, *E.* 51 *G.* 3. 410

4. Proof of a warrant to arrest *on suspicion* of high treason will not sustain a justification that the plaintiff was arrested and confined on a charge *of high treason*. *Bell* v. *Byrne*, *E.* 51 *G.* 3. 554

5. In an action for maliciously, &c arresting and holding the plaintiff to bail, in which the declaration in setting out the judgment by default in the former action stated, that "it was thereupon considered that the then plaintiffs should take nothing by their said writ, but that they *and their pledges to prosecute* should be in mercy, &c;" it is no material variance if the record produced in evidence have not the words "*and their pledges to prosecute*," but only have an "&c.;" for these words may be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit. *Judge* v. *Morgan*, *E.* 51 *G.* 3. 547

VENDOR AND VENDEE.

1. Where goods are sold and delivered upon an agreement by the vendee to pay for them by a bill at a certain date; as interest would have run upon such bill, if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods upon the common count for goods sold and delivered. *Marshall and Another* v. *Poole and Another*, *M.* 51 *G.* 3. 98

The same point was decided in this term in *Boyer* v. *Warburton*.

2. Where a sale-note for the purchase of 50 tons of *Greenland* oil was delivered by the sellers' broker to the purchasers to be paid for by their acceptance payable at a future day; and they afterwards received from the sellers an order on their wharfingers for the delivery of the 50 out of 90 tons of their oil; yet as the custom of the trade was for the casks to be searched by the sellers' cooper, and for a broker on behalf of both parties to ascertain the foot-dirt and water in each, (for which allowance was to be made,) and then the casks were to be filled up by the sellers' cooper, at their expence; all which was to precede the delivery to the buyers: held that the sale was not complete to pass the property; but that the sellers on the insolvency and subsequent bankruptcy of the buyers before such acts done and delivery made might countermand it. *Wallace and Others, Assignees of Anderson and Eades, Bankrupts*, v. *Breeds*, *E.* 51 *G.* 3. 522

WAGER.

A stakeholder receiving country bank-notes as money, and paying them over wrongfully to the original staker, after he had lost the wager, is answerable to the winner in an action for money had and received to his use. *Pickard* v. *Bankes*, *M.* 51 *G.* 3. 20

WARRANT.

Though the stat. 49 *G.* 3. *c.* 68. *s.* 3. directs a magistrate, upon complaint by an overseer of the poor against the reputed father of a bastard child for not obeying an order of bastardy, and proof upon oath, of the order for payment of maintenance,

tenance, and non-payment thereof, to issue his warrant to apprehend the reputed father; yet it is proper for the justice to issue a summons in the first instance to the party charged, to attend and shew cause, &c. *The King* v. *Martyr and Fulham, M.* 51 *G.* 3. 55

WASTE,

See FINE, 1.

WITNESS.

1. One who is subpœnaed as a witness, and attends at the trial, but there refuses to give evidence, unless his expences are paid, and is thereupon not examined, may yet maintain assumpsit for his necessary expences of attendance against the party who subpœnaed him. There was also evidence of a promise to pay the expences at the time of serving the subpœna; which it was contended was waved by the plaintiff's subsequent refusal to be examined. *Hallet* v. *Mears, M.* 51 *G.* 3. 15
2. There is no objection to a bastard, being of the years of discretion, giving evidence on an order of bastardy as to her reputed father; nor to the reputed father being examined, if he chuse to admit the fact; though he be not compellable to answer. *The King* v. *St. Mary's, Nottingham, E.* 10 *G.* 2. 57
3. Where one partner drew a bill in the partnership firm to the order of the firm, and indorsed it in the name of the firm, and after it was accepted by the defendant, passed it to the plaintiff, who was a separate creditor of such partner for his separate debt; in an action by the separate creditor against the acceptor, the latter may call either of the partners as a witness to disprove the authority of the debtor partner to give the joint security: for though if the separate creditor recovered against the acceptor, he would have his remedy over against the firm, yet the innocent partner would have his remedy over against the other. And the bankruptcy of the debtor partner in the mean time does not vary the question of competency. *Ridley and Another* v. *Taylor, M.* 51 *G.* 3. 175

END OF THE THIRTEENTH VOLUME.

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period, without having made a tender before action, or obtaining the common rule for staying proceedings on payment of debt and costs up to the time of the application. *Burmester* v. *Hilch*, *E*. 51 *G*. 3. 551

23. For the purpose of fixing the bail on scire facias, the capias ad satisfaciendum against the principal must lie the *four last* days in the office before the return: and the bail having once been prepared to render their principal in time; which they then omitted to do, in consequence of a rule nisi taken out by them on the suggestion of the Court with a view to an arrangement out of court between the parties, (the principal being a lunatic,) which rule was afterwards discharged, without providing for the bail to be placed in the same situation that they were before; the Court in a subsequent term permitted the bail to take the above objection to the regularity of the procedings, though they had before in the same term, before they were aware of this objection, brought forward another objection, which was overruled. *Cock* v. *Brockhurst and Another*, *E*. 51 *G*. 3. 588

PRESENTMENT,

See INDICTMENT.

A presentment by a magistrate under the stat. 13 *G* 3. *c*. 78. *s*. 24 of a nusance in the highway, must alledge the offence to be done against the form of the statute; and it is not enough to state that the magistrate, *by virtue of the act*, *&c*. presented, &c. *The King* v. *Winter*, *H*. 51 *G*. 3. 258

PRISONER.

1. The rule of Court of *H*. 26 *G*. 3. superseding a prisoner, against whom the plaintiff shall not proceed to *trial or final judgment* within three terms after declaration delivered, does not attach in a case where there are two defendants, one of whom suffered judgment by default, and the other pleaded to issue; the trial of such issue being had within the third term, though the costs were not taxed, nor final judgment in fact signed till after that term; but then entered, according to the course of the Court, as of that term. *Wriglesworth and Another* v. *Wright and Stacey*, *M*. 51 *G*. 3. 167

PRIZE.

See INSURANCE, 1. 4. STAMP, 3. and vide *Baker* v. *Jardine*, cited 235.

1. The commander of the *Cork* naval station on 3d of *May* ordered the *Loire* frigate, under his command, to cruize for a month within certain limits mentioned, (whether within the *Cork* station or not did not appear,) but in case of obtaining intelligence of the enemy being at sea, to return immediately and report the same to him, unless the captain should deem it more serviceable first to apprize the commander-in-chief of the *Channel* fleet off *Brest* of it, and then to return to *Cork* without loss of time. The *Loire* having sailed and obtained such intelligence on her cruize, went off *Brest*, and communicated it to the commander of the *Channel* fleet on the 25th of *May*, who on the 28th ordered the *Loire* to go off *Ferrol* with dispatches, &c.; and afterwards, and whilst in the execution of her former orders from the commander of the *Cork* station, to look out for the *Jamaica* homeward-bound convoy within certain limits, (which were partly within and partly beyond his original cruizing orders;) and if met with, to protect them up *St. George's* and the *Bristol Channel*. The *Loire* having delivered the dispatches, &c. to the naval commander off *Ferrol*, on her return took three prizes, beyond, as was admitted, the limits of the *Channel* station, and asserted to be

be within the *Cork* station: (but whether or not within the *Cork* station was deemed to be immaterial in this case.) Held, that the commander-in-chief of the *Channel* fleet did not, within the true meaning of his orders to the *Loire*, intend to retain her under his command after the execution of his orders off *Ferrol*, but only that she should attend to his further instructions while executing her original orders, and as a modification of or addition to such orders, rather than as a supercession or abrogation of them. But that, if he had so intended, he had no right so to retain her out of the limits of his command by partial modifications of her original orders, for the purpose of entitling himself to prizes taken by her out of such limits, in derogation of the rights of another flag-officer. *Lady Gardner and Others, Executrix and Executors of Lord Gardner*, v. *Lyne*, *E.* 51 *G* 3 574

2. Quære, how the case would be, where a cruizer in chace pursues an enemy out of the limits of one station into another. ibid.

PROPERTY-TAX.

1. The defendant having covenanted in an indenture to pay the plaintiff 300*l.* at the end of a twelvemonth, and in the mean time, and until payment thereof, to pay interest for it at 5*l.* per cent.; it is no answer to an action of debt for the 300*l.* and interest accrued thereon, to plead, that by the same indenture it was amongst other things covenanted, that the defendant should pay the property-tax *payable for and in respect of the said* 300*l.*: for the plea does not shew that the covenant for the payment of the property-tax attached on the interest payable for the 300*l.* principal; and the covenants as there exhibited appear to be independent; and therefore, though the latter should be void by the property-tax act, 46 *G.* 3. *c.* 65. *f.* 115 avoiding all contracts, covenants, &c. for the payment of any *interest*, &c. in full, without allowing the deduction of the tax, as directed by the act; yet that would not avoid the other independent covenant in the deed for the payment of the 300*l.* and interest. *Wigg and Another, Executors of Collier*, v. *Shuttleworth*, *M.* 51 *G.* 3. 87

QUO WARRANTO,

See CORPORATION.

REMOVAL, ORDER OF.

1. Coupling the stat. 35 *G.* 3. *c.* 101. (which enables two justices to suspend orders of removal on account of the sickness of the paupers, and to give the costs of such suspensions, with an appeal against such costs, if they amount to 20*l.*) with the stat. 3 *W.* & *M.* *c.* 11. *f.* 9. (which gives an appeal to the party *grieved* by any determination of the justices respecting the settlements of paupers by the means there mentioned;) appeals lie against an order of removal which was suspended, and against a subsequent order for costs; notwithstanding the death of the pauper before any removal of him in fact made, and though the costs were under 20*l.*; such order for costs attaching by consequence a *grievance* on the parish to which the order of removal was made, if the pauper were not settled in it. *The King* v. *The Inhabitants of St. Mary-le-Bone in Middlesex*, *M.* 51 *G.* 3. 51

REQUESTS,

See LONDON COURT OF REQUESTS.

SALE OF GOODS,

See VENDOR AND VENDEE.

SENTENCE,

See INSURANCE, 2.

SESSIONS AND ITS ORDERS,

See Appeal. Special Case.

An order of sessions, awarding such costs as other persons shall adjudge to be reasonable, is bad. *Rex* v. *St. Mary's, Nottingham, E.* 10 *G.* 2. 57

SETTLEMENT—*by Apprenticeship.*

1. The stat. 43 *Eliz. c.* 2. *s.* 1. enacting that the churchwardens of every parish, *and* four, three, or two substantial *householders* there, to be nominated by the magistrates, shall be *overseers of the poor*, requires an appointment to be made of *two* such overseers at the least, *exclusive* of the existing *churchwardens*; which body so constituted, or the greater part of them, are empowered to execute certain duties relating to the poor: and therefore the 5th section, which authorizes "*the said churchwardens and overseers, or the greater part of them,*" (by the assent of two justices,) to bind out poor children apprentices, is not satisfied by a compulsory binding by *two* persons styling themselves *churchwardens and overseers*, who had been appointed the overseers of the parish at a time when *one* of them was *churchwarden*; which latter continued the sole churchwarden for about two months afterwards, when the other overseer was appointed sole churchwarden in his place. For at all events this power is given to a body constituted of more than *two* persons; though it may be executed by the major part of the body when well constituted. And therefore a poor child, assumed to be bound apprentice by such an indenture, could not gain a settlement by service under it. *The King* v. *The Inhabitants of All Saints, Derby, M.* 51 *G.* 3. 143
2. An apprentice, after serving out most of his time with his master in *S.* obtained a subsequent settlement in *H.*, by serving another master there for 40 days by the direction of his first master, who was to receive 3*s.* a-week from the second master for such service: and being then dismissed by the second master, the apprentice, unknown to the first master, and without any intention of returning into his service again, lodged for one night in the same parish of *S.*, and then went into a third parish, and worked for himself for a month, when, his term being expired, he returned to *S.*, and went with his original master to a common friend, with whom the indenture had been deposited, to take it up; which he did, and carried it away. Held, that the settlement was not brought back to *S.* by such *casual* lodging of the apprentice one night in the same parish of his master, without any resumption of, or even intention to resume, the service with the first master under the indenture. *The King* v. *The Inhabitants of Smarden, E.* 51 *G.* 3. 452

SETTLEMENT—*by taking a Tenement of* 10*l. a-year.*

Settling for 40 days upon a tenement at the yearly rent of 10*l.*, the landlord paying rates and taxes, will confer a settlement upon the tenant. *The King* v. *The Inhabitants of St. Paul, Deptford, H.* 51 *G.* 3. 320

SETTLEMENT—*by and before Marriage.*

An order of justices for removing the *wife* and daughter of a pauper to the place of their residence, is supported primâ facie by shewing, that the parish to which the removal was made was the place of settlement of the wife before her marriage; although it also appeared by a copy of the marriage registry, that the husband was therein described to be *of another parish*; (which description was held to be no evidence of his having a settlement there;) and such

evidence throws the burden of proof upon the appellants, that the huſband was ſettled in another pariſh. *The King* v. *The Inhabitants of Harberton, H.* 51 *G.* 3. 311

SHIP AND SHIP REGISTER,

See Charter party. Freight.

1. The ſtat. 34 *G.* 3. *c.* 68. *ſ.* 18. giving a ſummary conviction againſt any maſter of a veſſel who, having received the certificate of its regiſtry, ſhall wilfully *detain and refuſe to deliver up the ſame to the proper officers empowered to make regiſtry,* &c. on the requiſition of the owner or major part of the owners, will not authorize a conviction of a maſter who did not comply with the requiſition of *the owner,* (though the *ſole* owner,) to deliver up ſuch certificate to *him*; though expreſſed to be for the purpoſe of his providing the neceſſary indorſement to be made on it at the cuſtom-houſe upon the transfer of the ſhip to him. *The King* v. *Pixley, M.* 51 *G.* 3. 91

4. The regiſtered owner of a ſhip, having chartered her to the then captain at a rent for a certain number of voyages, is not liable for ſtores furniſhed to the ſhip by order of the charterer during the charter-party. *Frazer* v. *Marſh, H.* 51 *G.* 3. 238

SMUGGLING,

See Execution, 1. *or* Hue and Cry, 1.

1. A veſſel hired by the Lords Commiſſioners of the Admiralty, and employed to cruize againſt ſmugglers, the maſter and crew of which were appointed by the owner, but which was placed under the ſuperior command of a captain appointed by the Board, is forfeitable for an act of ſmuggling committed on board by ſuch Admiralty captain, as well as by the owner's maſter and crew: and the owner has his remedy over by action on the caſe againſt ſuch Admiralty captain to recover damages for the loſs of his ſhip by the condemnation, though that proceeded upon acts of ſmuggling ſtated to be by perſons unknown; and though it appeared in fact that the maſter and mate appointed by the owner were alſo concerned in acts of ſmuggling on board. *Blewitt* v. *Hill, M* 51 *G.* 3. 13

SPECIAL CASE.

The Court of B. R. will take no cognizance of a ſpecial caſe reſerved upon the trial of an indictment at the ſeſſions *Rex* v. *The Inhabitants of Salop, M.* 51 *G.* 3. 95

STAMP.

1. The defendant agreed in writing to take one-half ſhare of certain goods bought by the plaintiff on their joint account; half in the profit or loſs; and to furniſh the plaintiff with half the amount in time for the payment thereof; the goods being to be paid for by bills: held, that this was an agreement *relating to the ſale of goods,* within the exemption in the ſtamp act, 44 *G.* 3. *c.* 98. ſched. A, and did not require a ſtamp. *Venning* v. *Leckie, M.* 51 *G.* 3. 7

2. An agreement by ſeveral for a ſubſcription to one common fund, ſuch as for making a wet dock at *Briſtol,* though ſeveral as to each ſubſcriber, only requires one ſtamp. *Davis* v. *Williams, H.* 51 *G.* 3. 232

3. An aſſignment of the prize-money of ſeveral ſeamen on board a privateer, being payable out of one fund, only requires one ſtamp. *Baker* v. *Jardine, T.* 1784, *B. R.* 235

4. Where an inſtrument contains a written contract of demiſe in its general terms, with a ſeveral operation in reſpect to the different tenants who ſign it for different eſtates at the different rents ſet againſt their ſignatures, and one ſtamp only appears

TIM-

TIMBER,

See Assumpsit, 5.

1. No action lies by the reversioner and owner of the inheritance to recover the value of timber, cut by the deceased tenant for life after a fine levied by her, whereby she acquired a base fee, and before the avoidance of such fine and base fee by the entry of the reversioner for that purpose; such entry not revesting the reversioner's old estate *by relation during the continuance of the base fee* thus created, so as to entitle him at law to the timber and other mesne profits taken during that interval. Even supposing that after the statute of limitations had run against the appropriate action, by the reversioner against the tenant for life, for mesne profits, or for waste, upon the original wrongful act of cutting down and converting the trees, an action of assumpsit for money had and received for the purchase-money of the trees sold, which was in fact paid to the former tenant for life within the six years, was maintainable against her representatives after her death. *Hughes* v. *Thomas and Another, Executrixes of Ann Evans, E.* 51 *G.* 3. 474

TITHES.

1. The rector of *Bromfield* parish having, from the year 1765, (as far back as living testimony could carry it) to 1799, received the tithes of a certain meadow called *the Demesne*, lying in a part of the township of *Kelsick, in the parish of* Holme Cultram, without interruption or claim from the rector of that parish, (other parts of *Kelsick* lying in *Bromfield*,) conveyed to the plaintiff in 1779 a messuage and lands *in* Kelsick, *in the parish of* Bromfield, and also all *tithes* of corn arising *within the township of* Kelsick *aforesaid*, or within the townfields, territories, precincts, *or titheable places thereof*: held, that this was evidence against the occupier of *the Demesne* meadow, though lying in *Holme Cultram* parish, of a title to the tithes in the rector of *Bromfield* before the conveyance to the plaintiff; and that the words of the deed were sufficient to convey them. *Barnes* v. *Messenger, H.* 51 *G.* 3. 251

2. Corn being titheable of common right in the sheaf, it is not competent for the farmer, without a custom, after a general notice to the parson that he should begin to reap on a certain day, or as soon after as the weather would permit, (and in fact the reaping continued for about a fortnight,) but before tithing, to put all the sheaves when bound immediately into large shocks or riders, consisting of eight sheaves set upon their ends against each other, with two covering sheaves placed roofwise on the top, for the purpose of protecting the whole against bad weather; from which shocks the 10th sheaves were afterwards drawn, without taking the rest of the shock to pieces; and the rest of the wheat shocks were removed from the ground in two hours, and the oat shocks in half an hour afterwards: for the parson has thereby no reasonable opportunity of comparing the 10th with the other 9 sheaves, as he is entitled to have: but the corn ought to be tithed in the sheaf before it is made up into shocks or riders. *Shallcross* v. *Jowle, H.* 51 *G.* 3. 261

TRESPASS,

See Indictment, 1.

The general highway act, 13 *G.* 3. *c.* 78. *s.* 27. & 29., authorizing surveyors of highways to take and carry the refuse stones from quarries for the repair of the highways, *making satisfaction for damage done to the lands* of any person *by carrying away the same*; and directing that if the surveyors cannot agree with the land-owners upon the amount of such satisfaction, *it shall be settled and ascertained*

ascertained by an order of justices; and providing further that no plaintiff shall recover for any trespass, &c., if tender of sufficient amends be made before action brought; and that in case no such tender be made, the defendant, by leave of Court, before issue joined, may pay money into Court: held that surveyors having broken a new way over the plaintiff's land, in order to carry such materials for repair, in a case where an old but circuitous road existed before; and having *after* the damage done, and after an action of trespass brought against them, paid money into court by way of amends; the sufficiency of such amends cannot be questioned at nisi prius; the statute having referred the quantum of amends, if not agreed upon, to the decision of justices of the peace. But it seems to be competent to the plaintiff in such action to shew that the making of such new road over his land was maliciously or wantonly done by the surveyors, and not for the necessary or convenient carriage of the materials over the land for the purposes of the act; and in such case he would not be concluded by the amends tendered or paid into court. *Boyfield* v. *Porter and Another*, *H.* 51 *G.*3. 200

TRIAL,

See Practice, 19.

1. Where the same plaintiff brought three actions of trespass against three several defendants for different parts which they took in the same transaction; one against the Speaker of the House of Commons, who justified under a warrant issued by him under the order of the House, for arresting and committing to the Tower the plaintiff, a member of the House, for a breach of privilege in publishing a libel upon the House; to which justificatory plea the plaintiff demurred: another against the Serjeant at Arms, who pleaded not guilty, and also justified under the authority of the Speaker's warrant; to which the plaintiff replied an excess in the manner of executing the warrant by a military force, and with improper and unnecessary violence; on which issue was joined to the country: and the third against the Constable of the Tower, who received and detained the plaintiff as a prisoner; and who also justified under a warrant from the Speaker for that purpose; in which issue was also taken to the country on several facts stated in such justification: and notice of trial was given by the plaintiff in the two last causes, (which stood for trial at bar on a day fixed,) but the plaintiff, though still within time by the general rules and practice of the Court, had not set down his demurrer in the first cause for argument: the Court, on motion of the Attorney-General on behalf of the Serjeant at Arms, and of the Constable of the Tower, postponed the trial of the issues in those causes until after the argument on the demurrer in the cause against the Speaker; because the right, just, and distinct consideration of the questions which arose on the issues of facts, and on the true measure of damages, in the causes against the Serjeant at Arms and the Constable of the Tower, depended mainly upon the decision of the issue in law joined in the other action against the Speaker: and though the same question of law might ultimately be raised on motion in the two former actions; yet it could not be considered so conveniently to the Court, to whom the decision of such question belonged, or so advantageously to the party who should prove to be in the right, as upon the demurrer, which presented the question of law distinct from the questions of fact. *Sir Francis Burdett,*

...art. v. Colman. The Same v. ...Earl of Moira, M. 51 G. 3. 27

Where a nonsuit is set aside *upon payment of costs*, such payment is made a condition precedent to the setting aside the nonsuit; and without it, the plaintiff cannot proceed to another trial. *Nichols* v. *Bozon*, *M.* 51 *G.* 3. 185

TROVER.

If a thing be deposited by one, with the authority of another, and received by the bailee, to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. But where it only appeared that it had been agreed between the assignor and the assignee of a lease, that, to save the expence of a counterpart, it should be deposited in the hands of a third person, and the assignee afterwards delivered it to the bailee to keep, but without mentioning that it was on the joint account; and no communication was made of the deposit to the assignor, who never interfered further in the matter; but the defendant afterwards (with the privity of the bailee, who acted as his agent,) procured an illegal and void conveyance of the property in it from the assignee: held that the assignee, or his legal representatives, might alone maintain trover for it, after demand and refusal. *May and Another, Assignees of Taylor, a Bankrupt*, v. *Harvey*, *H.* 51 *G.* 3. 197

TRUSTEES,

See Poor's Rate, 1.

1. *R. D.* being tenant for 99 years determinable on his life; *remainder to trustees to preserve contingent remainders*; remainder to his first and other sons in tail male; with remainders over; it was questioned at first whether a fine levied by the tenant for years in possession, and his eldest son, the first tenant in tail in remainder, was void against the remainder-man over, by reason that the trustees to preserve contingent remainders, in whom it was contended that a present freehold was vested during the life of the tenant for years, were no parties thereto: but it was held afterwards that the trustees had a vested, and not a contingent remainder, and that the present freehold interest was in them, to commence in possession upon the determination of the term of years by forfeiture or other means during the life of tenant for years; and therefore that such fine was void against the remainder-man *Berrington d. Dormer*, v. *Parkhurst*, *H.* 10 *G.* 2. *B. R.* 489
2. Neither is the estate of such remainder-man over discontinued; or his right of entry within five years taken away by another fine levied by the daughters of the first tenant in tail male; who, upon his death, wrongfully entered and were possessed, and thereby disseised the remainder-man over. ibid.

UNIFORMITY, ACT OF,

See Mandamus, 1, 2.

VARIANCE.

1. In ejectment, the premises being laid to be in *Farnham*, and proved to be in *Farnham Royal*, is not a fatal variance, unless it be shewn that there are two *Farnhams*. *Doe, d. Tollet*, v. *Salter*, *M.* 51 *G.* 3. 9
2. Where the contract of sale to the plaintiffs was for "25 tons of *Riga* flax on arrival of the first cargo we shall receive of our purchases on arrival for the ensuing season already made — to consist of a proportion of sorts;" semble, this would not support a count in an action on the case for non-delivery of the flax alleging it as an absolute, and not a conditional purchase; and alleging